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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1750

JACOB F. TUSSEL, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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TABLE OF CONTENTS

Opinions Below 1

Jurisdiction 2

Questions Presented for Review 2

Constitutional Provisions, United States Constitution
Amendment IV 3

Amendment V 3

Statement of the Case 3

REASONS FOR GRANTING THE WRIT:

This Court is requested to settle an important question of Federal Constitutional Law which has not been, but should be settled by this Court, whether the warrantless installation of a special transponder aboard the defendants' airplane (and the subsequent use of it to monitor the aircraft in flight) with only the consent of a government cooperative was a permissible intrusion into the aircraft under the Fourth Amendment 8

This Court is requested to decide whether the Court of Appeals erred in determining that the seizure at the Mount Pocono Airport took place at the functional equivalent of the border and whether the Court of Appeals erred in failing to consider whether the Court of Appeals erred in failing to consider whether the methods employed in making the seizure complied with the Fourth and Fifth Amendments 17

Conclusion 23

TABLE OF CONTENTS

CASES CITED:

Almeida-Sanchez v. United States,
413 U.S. 266, 272 (1973) 17

Berger v. New York,
388 U.S. 41 (1967) conformed to 231 N.E.2d 132 13

Brinegar v. United States,
338 U.S. 160, 175-176 Reh. Den.
338 U.S. 839 (1948) 13

Jones v. United States,
362 U.S. 257 (1959) 13, 16

Katz v. United States,
389 U.S. 347, 351 (1967) 9, 11, 12, 15

Lane v. United States,
321 F.2d 573, 576 (5th Cir. 1963) 20

Nardone v. United States,
308 U.S. 338 (1939) 21

People v. Smith,
13 Cal. Rptr. 764 (Court of Appeal,
Fifth District, 1977) 8, 10, 14

People v. Triggs,
506 P.2d 232, 236-237 (Cal. Supreme Court, 1973) 9

Rakas v. Illinois,
– U.S. –, 58 L.Ed.2d 387, 401-402 fn. 12
(1978) 15, 16

Recznick v. Lorain,
393 U.S. 166 (1968) 13

Rios v. United States,
364 U.S. 253, 261-262 (1959) 21

CASES CITED:

Sibron v. New York,
392 U.S. 40 (1968) 21

Silverthorne Lumber Co. v. United States,
251 U.S. 385 (1920) 21

Stoner v. California,
376 U.S. 483, 488, 489 (1964) 12

United States v. Bobisink,
415 F. Supp. 1334, 1338-1339 (D. Massachussetts
1976) 9, 10, 11

United States v. Bowman,
502 F.2d 1215, 1219 (5th Cir. 1974) 20

United States v. Holmes,
521 F.2d 859, 864-865 (5th Cir. 1975) 9, 10

United States v. Holmes,
537 F.2d 227 (5th Cir. 1976) 9

United States v. Ivey,
546 F.2d 139, 142 (5th Cir. 1977) 17

United States v. Nelson,
No. 78-1587 (3rd Cir. March 8, 1979) 2, 17

United States v. Potter,
552 F.2d 901 (9th Cir. 1977) 17

United States v. Storm,
480 F.2d 701, 704 (5th Cir. 1973) 20

Warden, Maryland Penitentiary v. Hayden,
387 U.S. 294 (1967) 14

Wong Sun v. United States,
371 U.S. 471 (1963) 21

TABLE OF CONTENTS

U.S. CONSTITUTION CITED:

Fourth Amendment 3

Fifth Amendment 3

MISCELLANEOUS CITED:

68 Am. Jur.2d 695-696 13

68 Am. Jur.2d 697 14

APPENDIX

Appendix A
Opinion of the United States District Court for the Middle District of Pennsylvania (441 F. Supp. 1092) 1A

Appendix B
Order of the United States Court of Appeals for the Third Circuit entered March 23, 1979, affirming the judgment of the District Court 45B

Appendix C
Order of the United States Court of Appeals for the Third Circuit entered April 24, 1979, denying Petition for rehearing 47C

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No.

Jacob F. Tussel, Jr.

Petitioner,

vs.

United States of America,

Respondent.

Petition For a Writ of Certiorari To The United States Court of Appeals For The Third Circuit

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Jacob F. Tussel, Jr., the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on March 23, 1979.

OPINIONS BELOW

The opinion of the United States District Court for the Middle District of Pennsylvania, denying the petitioner's pretrial motion to suppress evidence is reported at 441 F. Supp. 1092 (M.D. Pa. 1977) and is printed in Appendix A hereto, ***infra***, page 1A. Also printed in Appen-

dix A hereto, *infra*, page 40A is the District Court's unreported Order, entered April 28, 1979, dismissing Counts 2 and 3 of the indictment against the petitioner in exchange for his guilty plea to Count 1.

Printed in Appendix B hereto, *infra*, page 45B, is the unreported Order, entered March 23, 1979, of the United States Court of Appeals for the Third Circuit affirming the judgment of the District Court. Also printed in Appendix A hereto, *infra*, page 41A, is the reported decision of the Court of Appeals in *United States v. Nelson*, No. 78-1587, companion case to the petitioner's case.

The Order of the Court of Appeals denying petition for rehearing is not reported, however, a copy of the Order is printed in Appendix C hereto.

JURISDICTION

The Order of the Court of Appeals affirming the judgment of the District Court was entered on March 23, 1979. A timely petition for rehearing was denied on April 24, 1979. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1).

This Petition for a Writ of Certiorari is filed within thirty days of the aforementioned Order denying petitioner's petition for rehearing.

QUESTIONS PRESENTED FOR REVIEW

Whether the warrantless installation of a special transponder aboard the defendants' airplane (and the subsequent use of it to monitor the aircraft in flight) with only the consent of a government cooperative was a permissible intrusion into the aircraft under the Fourth Amendment.

Whether the Court of Appeals erred in determining that the seizure at the Mount Pocono Airport took place at the functional equivalent of the border and in failing to consider whether the methods employed in making the seizure complied with due process.

CONSTITUTIONAL PROVISIONS
UNITED STATES CONSTITUTION
AMENDMENT (IV)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT (V)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On or about November 3, 1976, Special Agent Charles Wunder of the United States Customs Service, was approached by Mr. Carl Nassauer, manager of the Mount Pocono Airport. Nassauer, who was in frequent com-

munication with Wunder on a confidential basis throughout early November, advised Wunder that he had been contacted by certain persons in an effort to enlist his cooperation in an enterprise described as being a "little bit illegal," *i.e.*, the unloading of cargo without federally required unloading certificates at the Mount Pocono Airport (SHT-188, 193, 226, 236-37).[1]

Meanwhile, in Florida, Norman Bonner, a professional flight engineer, was contacted by government agents attached to the United States Customs Service and the Drug Enforcement Administration prior to ever having contact with any of the defendants in this case. He was instructed to locate a suitable crew for smuggling purposes and await contact by individuals interested in the employment of such an aircraft. Pursuant to the authorities' request, he selected Derek Mettrick as his pilot (TT-Vol. III, Pgs. 476-478; 498; 532).[2]

On or about November 6, 1976, Mettrick, having located a DC-6 aircraft for the use of the defendants in accordance with the instructions of Edward Regan, the head of the Air Support Branch of Customs in Miami, was contacted by the defendants, who gave Mettrick the necessary monies to lease the airplane which he had selected for them (TT-Vol. III, Pgs. 619-622, 625, 684).

Pursuant to an agreement between them, Mettrick had been keeping Regan posted with respect to every contact he had with the defendants. On the morning of

1. "SHT", as used in this brief, refers to excerpts from the transcript of the suppression hearing in the District Court.

2. "TT", as used in this brief, refers to excerpts from the trial of Petitioner's co-defendants, Mike Nelson and Salvatore LaBates, with which the Pet. sought, by Motion filed on May 24, 1978, in the Court of Appeals, to have the record of the suppression hearing in the District Court supplemented.

November 12, 1976, Mettrick met with Regan in Regan's office at Homestead Air Force Base in Florida. Regan asked Mettrick if he would permit Regan to install a special transponder on the DC-6 which Mettrick had leased on behalf of the defendants, so that the federal authorities could track the plane. Mettrick gave Regan permission to have the special transponder installed (TT-Vol. III, Pgs. 663, 744-746; SH T-15, 69, 72-73, 78-79, 100, 109).

That same evening, at about 9:00 P.M., William K. Hamilton, an air officer with the Miami Air Support Branch of Customs, did, without obtaining a search warrant, surreptitiously install a special transponder in the DC-6. Although transponders are normally located in plain view, he installed the special transponder in such a way as to hide it. The installation of the special transponder did not affect the operation of the primary and back-up transponders required by Federal Aviation Administration regulations (SHT-11, 32, 43, 95-96, 109).

A transponder is a device which provides information from which the plane's location, groundspeed, airspeed and direction can be determined. In ordinary operation, a pilot is instructed by ground control to set the transponder being used to a specific identifying frequency. An automatic signal from ground control "interrogates" the transponder to obtain the desired information. The special transponders used by the Customs Service emit a preset frequency common to all such transponders that cannot be adjusted while in use (SHT-8-9, 12, 29, 36, 120, 152).

On November 12, 1976, prior to the installation of the special transponder, Special Agent Wunder learned from Customs in Miami that the Petitioner was the focus of the investigation by Customs in Miami that involved the in-

stallation of the special transponder. The Petitioner's name had also been mentioned to Wunder by his informant Nassauer in connection with the Mount Pocono Airport cargo operation about which Nassauer had approached Wunder (SHT-189, 223 and 194-195).

After the filing of a general declaration by the pilot Mettrick indicating a destination of South Caicos, Bahamas, the DC-6 left Miami on December 12, 1976. The flight was monitored via the special transponder until the DC-6 was beyond the 300-mile range of the Miami air traffic control equipment. Testimony by Mr. Hamilton at the suppression hearing indicates that, once the DC-6 left the Miami ATC radius, the government received no further information on the plane until it was monitored in domestic airspace 20 miles east of Charleston, South Carolina, later on the night of December 12, 1976 (SHT-17, 21, 22 and 64; TT-Vol. IV-886-888; SHT-81).

After the plane's signal was picked up 20 miles east of Charleston, the information obtained by the government's interrogation of the special transponder as it moved north was relayed by the New York and Washington Federal Aviation Administration posts to Special Agent Wunder. This information included the route that the DC-6 was taking and its estimated time of arrival at the Mount Pocono Airport, where Wunder waited for it (SHT-199).

In addition, Wunder was advised by Air Detail, Customs, Philadelphia patrol and New York Air Detail of the general declaration filed by Mettrick indicating a destination of South Caicos, Bahamas (SHT-241-242).

At about 1:00 A.M. on December 13, the DC-6 landed at Mount Pocono Airport. After approximately one hour and forty-five minutes, a number of vehicles, including a gas truck, rental vans and a Mercedes automobile, pulled up to the plane and the unloading of an unknown cargo began. Then, when Wunder gave a pre-arranged signal to the team of Customs Agents, agents of the Drug Enforcement Administration and members of the Pennsylvania State Police with which he had been lying in wait for the DC-6, twelve of the seventeen members of the team closed in on the plane and the vehicles around it (SHT-165; 201-203, 207, 210-211).

As Wunder's forces moved in, they fired two rounds of gunfire, and arrested five persons (including the Petitioner and co-defendants Sadowsky, Laurie, Whalen and Massaro) in the immediate vicinity of the plane. They also seized the plane, approximately eight tons of marijuana, a Mercedes car, a station wagon, a van and assorted items of radio equipment (SHT-164, 312, 313).

Furthermore, when Wunder gave his signal to close in on the plane, other members of his team stationed in other parts of the airport (SHT-386-388, 391-392) and patrolling Route 611, which is adjacent to the Mount Pocono Airport, intercepted and arrested other defendants (SHT-283-286, 297, 372, 377-381).

The Petitioner, along with eleven other named defendants, was indicted by a federal grand jury in the Middle District of Pennsylvania and charged, on December 21, 1976, with (a) conspiracy to commit offenses in violation of Title 21, U.S.C. §§952, 955, 960; (b) importation of a controlled substance, marijuana, in violation of Title 18, U.S.C. §2 and Title 21, U.S.C. §952(a); (c) possession of a controlled substance in violation of Title 21, U.S.C. §955 and 960.

On December 5, 1977, the Petitioner entered a plea of guilty to the first count of the indictment which charged

him with conspiracy in violation of the Controlled Substance Act.

On April 28, 1978, the Petitioner petitioned the District Court for leave to withdraw his plea of guilty on the grounds that the District Court had not advised him of his appellate rights on December 5, 1977. The District Court granted the Petitioner's Motion to Withdraw his plea of guilty and enter a conditional plea of guilty, thereby preserving for appellate purposes the issue of the constitutionality of the seizures made by the government on December 13, 1976.

Prior to trial, defendants filed a motion to suppress the marijuana seized on December 13, 1976. On July 28, 1977, a hearing was conducted by the District Court and on November 11, 1977 the motion to suppress was denied.

REASONS FOR GRANTING THE WRIT

This Court is requested to settle an important question of Federal Constitutional Law which has not been, but should be settled by this Court, whether the warrantless installation of a special transponder aboard the defendants' airplane (and the subsequent use of it to monitor the aircraft in flight) with only the consent of a government cooperative was a permissible intrusion into the aircraft under the Fourth Amendment.

The warrantless, covert installation of a special transponder aboard the defendants' DC-6 (SHT-32-34, 41-46), did constitute a search within the meaning of the Fourth Amendment. This is clear from the opinion of the Court in *People v. Smith*, 13 Cal. Rptr. 764 (Court of Appeal, Fifth District, 1977), another case involving government installation of a transponder on an airplane for the purpose of investigating drug smuggling. The Court's analysis of the Fourth Amendment indicates, at 771, that ". . . (A) search within the tenor of the Fourth Amendment occurs whenever the police intrude upon one's reasonable expectation of privacy and the intrusion, as here, is for the purpose of facilitating the discovery and gathering of incriminating evidence whether the contemplated discovery or gathering is immediate or not." Cases supporting this view of the Fourth Amendment's role as protector of a citizen's "reasonable expectation of privacy" include *Katz v. United States*, 389 U.S. 347 (1967); *People v. Triggs*, 506 P.2d 232, 236-237 (Cal. Supreme Court, 1973); *United States v. Bobisink*, 415 F. Supp. 1334, 1338-1339 (D. Massachusetts 1976); *United States v. Holmes*, 521 F.2d 859, 864-865 (5th Cir. 1975); *United States v. Holmes*, 537 F.2d 227 (5th Cir. 1976).

The government attempted, through the testimony of Mr. Hamilton at the suppression hearing (SHT-11-12) to establish that the defendants had no such reasonable expectation of privacy while flying in their rented DC-6 because the required primary and secondary transponders were already onboard the aircraft when Mr. Hamilton hid the third one.

This argument cannot be allowed to prevail, however. In the first place, there is one very significant distinction between the required transponders and the special one. That distinction is the fact that Mr. Hamilton hid the special transponder (SHT-32) so that it could not be turned off by the defendants, unlike the primary and back-up transponders.

In the second place, this argument obscures the real issue here. The real issue, as noted in *People v. Smith*, *supra*, at 771, is whether the defendants "reasonably could expect that the police would not impermissibly intrude into the airplane itself and install a special tracking device hidden from view, in order to keep that very airplane under constant police surveillance so that they could gather incriminating evidence" against him. A review of cases dealing with situations analogous to the one presented in this case leads to the same conclusion as that reached by the court in *People v. Smith*, *supra* at 773: ". . . (T)he Fourth Amendment and its prophylactic proscriptions come into play not only when the police authorities are looking for something that is concealed, but also when the police, in order to facilitate the discovery and gathering of evidence, impermissibly enter private property to install electronic surveillance equipment in a location which most persons would have no reason to suspect is being used for such a purpose even though other unobjectionable methods are available for discovering and gathering the same evidence." See also the cases cited in *People v. Smith*, *supra* at 771-773, *United States v. Holmes*, *supra*, and *United States v. Bobisink*, *supra*. *United States v. Holmes*, *supra*, and *United States v. Bobisink*, *supra*, involve government surveillance through the attachment of electronic "beepers" to the defendants' vehicles, with each court remarking in its opinion on the availability of other unobjectionable methods of government surveillance. Thus, the court in *United States v. Holmes*, *supra* at 866, determined that the attachment of a beeper was a search and that "a person has a right to expect that when he drives his car into the street, the police will not attach an electronic surveillance device to his car in order to track him. Although he can anticipate visual surveillance, he can reasonably expect to be 'alone' in his car when he enters it and drives away." The remarks of the Court in *United States v. Bobisink*, *supra* at 1339, are to the same effect.

At this point, it should be observed that a transponder has at least as much potential as a tool for governmental electronic surveillance searches as does a beeper, and may in fact pose a far greater threat to a subject's privacy then does a beeper. Thus, Mr. Hamilton stated at the suppression hearing (SHT-160-161) that only a transponder's and not a beeper's signal can be run through a computer to give a plane's air speed, ground speed, etc. Furthermore, Mr. Hamilton stated (SHT-163) that, although a subject can scan for a beeper to detect its presence, this is not possible with a transponder.

Based upon recognition of the fact that the Fourth Amendment "protects people, not places" (*Katz v. United States, supra*, 351 and upon an examination of "the totality of the facts and circumstances," Mettrick's consent to the installation of the special transponder should be nullified. For Derek Mettrick was a government operative at the time he leased the DC-6 on behalf of the defendants and when he waived their Fourth Amendment rights by consenting to the installation of the transponder.

Perhaps the best expression of the true nature of Mettrick's relationship with the government and with the defendants is the description of it given by Mettrick in his testimony at the Nelson-La Bate trial regarding his consent to Regan's installation of the transponder on the defendants' DC-6 (TT-Vol. III, 774-776). At that point, Mettrick stated in no uncertain terms that he "didn't want to have anything to do and never did have anything to do with the individuals whom (he says) were involved in the transportation (of marijuana)" and that "at all times (he was) working for and on behalf of the government" (TT-

Vol. III, 745-746). Thus, Mettrick's testimony makes it clear that he was an operative of the federal government when he procured the plane on behalf of the defendants (TT-351-352 and TT-625) and when he consented to the installation of a special transponder by Regan (TT-Vol. III, 744-746), so that the plane could be tracked from the ground by the federal authorities.

The foregoing analysis of the "totality of the facts and circumstances" establishes that the District Court erred in holding that Mettrick properly consented to the installation of the transponder. For the threat of erosion of the Fourth Amendment warned of in *Stoner v. California*, 376 U.S. 483, 488, 489 (1964), will certainly become a reality if the government operative Mettrick is allowed to lease a plane on behalf of the defendants and then waive their Fourth Amendment rights by consenting to the installation of the special transponder.

Furthermore, in examining the "totality of the facts and circumstances," as directed in *Katz, supra*, it should be noted that Mettrick was not the true lessee of the aircraft. Senior Special Agent Wunder testified at the suppression hearing (SHT-351-352) that Mettrick acted on behalf of some of the defendants in looking for and leasing the plane and that he used their money to lease it. Wunder's testimony is buttressed by that of Mettrick himself, when he testified at the Nelson-LaBate trial that one of the services he agreed to render to the defendants was the procurement of a plane (TT-Vol. III, 615), that he did procure a plane (TT-Vol. III, 625) and that he received $20,000.00 from defendant Nelson for rental on the plane (TT-Vol. III, 622). In addition, there is the aforementioned testimony by Mettrick (TT-Vol. III, 745-746) in which he dissociates himself from the defendants and their alleged plan to transport marijuana.

In addition to there being no valid consent to the installation of the transponder, the warrantless search cannot be supported by probable cause and exigent circumstances. There is nothing in the record of either the suppression hearing or the Nelson-LaBate trial to indicate that either Hamilton or Regan had knowledge themselves which would warrant a man of reasonable caution to believe that an offense had been or was being committed. *Brinegar v. United States*, 338 U.S. 160, 175-176, Reh. Den. 338 U.S. 839 (1948); *Berger v. New York*, 388 U.S. 41 (1967), conformed to 231 N.E.2d 132, and 68 Am. Jur. 2d 695-696. In fact, the only source of the installing agents' information was Mettrick. And he can hardly be considered a source of "reasonably trustworthy information," since apparently the only attempt to corroborate anything that Mettrick was telling the government at the time of the transponder installation was Hamilton's check on Mettrick's pilot's license after the meeting with Regan and Mettrick on November 12, 1976 (SHT-109).

Furthermore, this total reliance upon the information supplied by Mettrick without corroboration does, itself, mean that there was no probable cause for the transponder installation. For, "In determining probable cause, a law officer may rely upon information received through an informant, rather than upon his direct observations, so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge." *Recznick v. Lorain*, 393 U.S. 166 (1968); *Jones v. United States*, 362 U.S. 257 (1959) and 68 Am. Jur. 2d 696.

Even if agents installing the special transponder had probable cause for the installation, the warrantless installation would still be impermissible under the Fourth Amendment, since there were no exigent circumstances existing

at the time of the installation. *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294 (1967); 68 Am. Jur. 2d 697.

The instant case is one in which the conditions are such that a finding of no exigent circumstances is even more compelling than in *People v. Smith, supra*, 769. For in this case, unlike in *Smith*, the government was not compelled to wait to install the transponder onboard the plane, rather, the government agents deliberately waited hours from the morning of November 12, 1976 (SHT-25), so that they could do their work in secret, under cover of darkness (SHT-43).

Furthermore, in this case, unlike in *Smith*, the government had the full cooperation of Mettrick, the pilot, in installing the transponder (SHT-123 and TT-744-746) and in keeping the government informed of the plane's movements out of the jurisdiction (SHT-121 and TT-663). So certain were government agents Ragan and Hamilton of Mettrick's cooperation that they even told him when they would install the transponder (SHT-123).

Finally, it should be noted that the record here, as in *People v. Smith, supra* at 769, discloses no attempt by the government agents installing the special transponder to obtain post-installation court approval of its attachment to the aircraft.

At this point, it should be noted that the petitioner has standing to challenge the constitutionality of the government's entry into the plane to install the special transponder. The Petitioner was involved in a joint venture with his co-defendants which involved their acquiring control (*i.e.*, leasing and determining where and when it flew and who had access to it) of the DC-6 in which the special transponder was installed by Air Officer Hamilton. As a member of this group of joint venturers, Tussel had an interest in the airplane at the time that the special transponder was

installed, which gave him a legitimate expectation of privacy (*See Katz v. United States, supra*, 353), in the airplane under the standards described by the Court in *Rakas v. Illinois*, – U.S. –, 58 Lawyer's Ed.2d 387, 401-402, fn. 12 (1978).

This view of the control exercised over the airplane by the petitioner and his co-defendants is supported by the record below. Thus, the record discloses that it was the defendants and not Mettrick, who were the true lessees of the plane. For they directed that it be leased (TT-Vol. III, Pg. 615) and provided the money to lease it (TT-Vol. III, Pg. 619-622, 625, 684).

Furthermore, as a participant in the joint venture, the Petitioner's primary function was to assert control over the airplane on behalf of himself and his fellow joint venturers by watching over as well as participating in every phase of the management and operation of the airplane from the time it was leased, and so making sure that nothing and no one interfered with the joint venture. Thus, Tussel was the joint venturer who was in immediate control of the airplane and had the accompanying right to exclude from the airplane anyone interfering with the joint venture. Therefore, the petitioner's function in the joint venture embodied the control which the joint venturers exercised over the airplane at the time the special transponder was installed in it. The same sort of control which *Rakas, supra*, describes as evidencing a legitimate expectation of privacy.

That a duty to control the plane on behalf of his co-venturers was conferred upon the petitioner is illustrated by the fact that, while the joint venturers went outside their circle to find a flight engineer and pilot (TT-Vol. III, Pg. 477-481, 615, 654-656), they made certain that one of their number, *i.e.*, the petitioner, would, as co-pilot (TT-Vol. III, pgs. 481-482, 625-626; TT-Vol. V-1099), always have

his hands on the controls. The petitioner's duty to control the plane is also illustrated by the fact that Tussel was consistently on hand to watch over the airplane while it was on the ground (TT-Vol. III, pgs. 481-482; 625-626; 633-634).

Even if there had been no joint venture, the Petitioner's legitimate expectations of privacy in the airplane at the time of the installation of the special transponder would still be established. For its existence can readily be demonstrated by a comparison of the Petitioner's relation to the leased plane in this case and that between the defendant in *Jones v. United States, supra,* and the premises that he was occupying when they were searched. Thus, in each case, control of the leased premises had been turned over to a third party by a lessee of the premises.

In each case, too, the right to exclude others from the searched premises was turned over along with control of the premises. For, just as the key to his borrowed apartment gave Jones "complete dominion and control over the apartment" (except with respect to the lessee) and enabled him to exclude others from it (*See Rakas, supra,* at 404-405), the petitioner's assignment as co-pilot/security man, discussed above, gave the petitioner control over the leased airplane which enabled him to exclude from it all but the lessees.

Thus, in accordance with the standards set forth in *Rakas, supra,* both Jones and the petitioner had a legitimate expectation of privacy in the searched premises.

This Court is requested to decide whether the Court of Appeals erred in determining that the seizure at the Mount Pocono Airport took place at the functional equivalent of the border and whether the Court of Appeals erred in failing to consider whether the methods employed in making the seizure complied with the Fourth and Fifth Amendments.

In *United States v. Nelson,* No. 78-1587 (3rd Cir., March 8, 1979), the Court of Appeals decided the companion case to the instant case.

Subsequently, in deciding the instant case, the Court of Appeals determined that its holding in *Nelson, supra,* controls the outcome of the instant case. Thus, the Court of Appeals' holding in *Nelson, supra,* at 3-4, that "Agent Wunder's testimony at the suppression hearing establishes that the information provided by his informant at the airport and by the Florida authorities gave him a reasonable certainty that the flight was arriving at Mount Pocono nonstop from abroad, making the airport a 'functional equivalent' of a border" was held to be binding in the instant case. However, the record below leaves considerable doubt as to the foreign origin of the flight, and so this holding is not in keeping with the Supreme Court's decision in *Almeida-Sanchez v. United States,*[3] 413 U.S. 266, 273-274 (1973) in which the concept of functional equivalent of the border is discussed by the Court. For, first of all, there is Agent Wunder's testimony (SHT-246-247) that, for all he knows, the radar information that the plane left the continental United States on December 12, 1976 could have come from the special transponder.

Furthermore, there is the testimony of Wunder (SHT 241-242) that the source of his information that the air-

3. See also, *U.S. v. Ivey,* 546 F.2d 139 (5th Cir.) *cert. denied,* 431 U.S. 943 (1977); *U.S. v. Potter,* 552 F.2d 901 (9th Cir. 1977).

craft left the continental United States on December 12, 1976 was a declaration of destination from the pilot, and, as Mr. Wunder admitted, a person could file such a declaration and not go out-bound (SHT-241-242). At this point, it should also be noted that Wunder admittedly (SHT-241) had no information that the aircraft under investigation had ever engaged in international travel prior to December 12, 1976.

Similarly, the suppression hearing testimony of William K. Hamilton that, before the plane left on December 12, 1976, a flight plan had been filed for it to go to South Caicos in the Bahama Islands (SHT-18 and 19) is inconclusive at best. For the mere filing of such a flight plan would not establish that the flight was made.

Furthermore, testimony at the suppression hearing (SHT-81) suggests that the government had no information on the plane from the time it left the Miami ATC radius until it showed up in domestic airspace 20 miles east of Charleston, South Carolina, later on December 12, 1976. In fact, the government did not monitor the flight intercepted by Wunder from a point outside the United States until it landed at Mount Pocono. Therefore, even assuming *arguendo* that the plane did leave the United States, the government's monitoring of the flight does not indicate with any degree of certainty that it had a foreign point of origin. For, during the unaccounted-for period when the plane was not being monitored, the plane could quite possibly have set down somewhere within the continental United States and completely lost its character as an international flight long before it ever arrived in Pennsylvania.

In addition to the foregoing, the record below shows that Wunder's independent investigation failed to unearth sufficient information to give him a reasonable certainty

that the flight he was intercepting at Mount Pocono was arriving nonstop from abroad. Wunder mentioned the size of the aircraft, the amount of fuel requested and the FAA cargo violation as the factors that supported his belief that the plane was coming into Mount Pocono from outside the United States (SHT-223-227). However, these points do not reasonably indicate an international flight. Furthermore, Wunder admitted that he had "no idea" of the range of a DC-3, DC-4, or DC-6 on the amount of fuel requested (SHT-348) and that the significance which he attached to it was "purely guess work" (SHT-350). He also admitted that the aircraft could legally carry cargo domestically even with a large fuel load and without a FAA certificate without violating Customs laws (SHT-240).

Even combined with the information furnished by Mettrick and Nassauer, the totality of the information possessed by Wunder could not have given him a reasonable certainty that the flight he was intercepting was international. For the fact that there is nothing in the record which establishes that the reliability of either informant was ever previously tested indicates that their reliability was questionable at best. Another point indicating that Mettrick was not shown to be a reliable informant is the fact that apparently the only attempt to corroborate what Mettrick was telling the government was Hamilton's check on Mettrick's pilot's license after the meeting with Regan and Mettrick on November 12, 1976 (SH T-109).

Furthermore, Nassauer's information was only that the unloading of the cargo would be in violation of FAA regulations; there was nothing in his tip to suggest that the flight would be international (SHT-238). Mr. Nassauer never discussed the nature of the cargo with the defendants (TT-225) and he never indicated to Wunder that

the cargo would be marijuana (SHT-238). In fact, Nassauer's testimony at the Nelson-LaBate trial states that none of the aircraft numbers that had been given to him by Wunder in connection with investigations by him of illegal drug traffic matched those of the aircraft involved in events about which Nassauer testified (TT-274 and 279-280).

By upholding the constitutionality of the Mount Pocono search, the Court of Appeals erred in failing to consider the constitutionality of the search methods employed by the government, and so promoted conflict and confusion among the circuits as to what constitutional standards apply to the methods employed by the government in conducting a border search, an important question of federal constitutional law which should now be decided by this Court.

Even if Mount Pocono Airport be deemed to be the functional equivalent of the border, the methods employed in conducting the search had to be consistent with a reasonable search and had to be in compliance with due process. *See United States v. Bowman*, 502 F.2d 1215, 1219 (5th Cir. 1974); *United States v. Storm*, 480 F.2d 701, 704 (5th Cir. 1973); *Lane v. United States*, 321 F.2d 573, 576 (5th Cir. 1963).

However, the record below indicates that the search methods employed by Wunder and his men amounted to a commando raid which endangered the lives of unarmed suspects, was unreasonable under the circumstances, and so failed to satisfy due process. Thus, the petitioner notes that Customs Agent Wunder testified at the suppression hearing that seventeen officers from several police agencies, all heavily armed, were waiting for the plane when it arrived (SHT-306). When a prearranged signal was given, the officers moved in and immobilized the plane, its passengers and anyone at or in the vicinity of the airport (whom the government forces outnumbered by better than two-to-one) (SHT-307, 337). At least one of the defendants was forced to the ground by a police officer, and a gun was held to his head (SHT-392-393). There was no testimony that the police believed that the defendants would be armed, nor were any guns taken from any of the defendants after their arrest. However, two rounds were fired by Wunder's task force.

Finally, it should be observed that the petitioner denies the existence of probable cause and exigent circumstances to support the Wunder's warrantless search and seizure and the existence of probable cause to support the arrests of the petitioner and the other defendants at the Mount Pocono Airport. Since any information obtained by Wunder from the illegal installation of the transponder represents "fruit of the poisonous tree" and so cannot be considered as providing him with probable cause for either the search and seizure[4] or arrests,[5] information obtained from other, independent sources must be relied on. However, as is suggested by the above discussion of the limited information obtained by Wunder from Nassauer and Miami Customs, this information was insufficient to provide him with probable cause. Similarly, personal observations of the government agents at the time of the seizure and arrests could not furnish probable cause, because nothing incriminating was detected until after the seizure and arrests were made, when marijuana was detected (SHT-216-217).

In any case, there were no exigent circumstances at the time of search and seizure. Thus, for one hour and

4. See *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920); *Nardone v. United States*, 308 U.S. 338 (1939); *Wong Sun v. United States*, 371 U.S. 471 (1963).

5. See *Rios v. United States*, 364 U.S. 253, 261-262 (1959); *Sibron v. New York*, 392 U.S. 40 (1968).

forty-five minutes after the defendants' plane landed, the only ones on board were government cooperatives Bonner and Mettrick (TT-Vol. III, pgs. 745-746; 518, 525-526, 529; 647; SHT-353). Furthermore, Wunder could have contacted the U.S. Attorney's Office from the airfield (SHT-342), and a Magistrate was within an hour's drive from the scene. Finally, when the defendants' plane arrived, the airport was in the grip of a heavy snowstorm with high winds (SH T-202, 205, 207, 210-211), which would have certainly discouraged any sudden departure by the defendants.

CONCLUSION

Wherefore, Petitioner respectfully requests that a Writ of Certiorari be issued to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX A

Opinion of the United States District Court for the Middle District of Pennsylvania (441 F. Supp. 1092)

United States of America

v.

Jacob F. Tussel, Jr., Jonathan Sadowsky, Sal La Bate, Grant Davis, Mike Nelson, William J. Laurie, Jr., Robert G. Whalen, Charles T. Massaro, Robert I. Cutler, Nils Cary Nelson, Eugene H. Powell, III, Elizabeth Porto

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No. 76-158 Criminal

United States District Court,
M.D. Pennsylvania
November 11, 1977

Defendants, charged with marijuana offenses, moved to suppress evidence. The District Court, Nealon, Chief Judge, held that: (1) although aircraft pilot was an informer he had authority to consent to entry into plane for purpose of installing a special transponder; (2) monitoring through use of such transponder violated no reasonable expectation of privacy because of the customary monitoring of the planes in flight that is conducted by air traffic control stations; (3) interception of the aircraft at small noncommercial Pennsylvania airport occurred at functional equivalent of the border since customs agent had a reasonable basis for believing that it was on an international flight and interception was based on reasonable suspicion of illegal activity, i.e., smuggling of marijuana; (4) customs agents were justified in searching the plane and vehicles in immediate vicinity thereof and in seizing contraband and de-

taining persons found thereat and (5) arrest of persons in immediate vicinity of the aircraft and of persons in another area of the airport and on adjacent access highway were conducted with probable cause.

Motion denied.

1. Criminal Law Key 394.5(4)

Since arrest, search and seizures were conducted without warrants, the Government had the burden at suppression hearing of going forward with its proof. U.S.C.A. Const. Amend. 4.

2. Criminal Law Key 394.5(4)

To meet its burden of going forward with proof at a suppression hearing Government was not required to produce informant, who purportedly consented to installation of transponder on aircraft allegedly to be used in transporting contraband and who piloted the plane. U.S.C.A. Const. Amend. 4.

3. Criminal Law Key 394.6(4)

Hearsay evidence may be considered at suppression hearing without regard to the matter in issue; however, the court remains obligated to weigh the evidence and discount that which is less reliable. U.S.C.A. Const. Amend. 4; Federal Rules of Evidence, rules 104(a), 1101(d)(1), 28 U.S.C.A.

4. Criminal Law Key 394.6(4)

To meet its burden of going forward with its proof at suppression hearing the Government was not required to call pilot of the subject aircraft to establish his consent to surreptitious placing of a transponder aboard the aircraft; nature of consent did not require firsthand testimony from the person allegedly giving it and consent could be established by hearsay. Federal Rules of Evidence, rules 104 (a), 1101(d)(1), 28 U.S.C.A; U.S.C.A. Const. Amend. 4.

5. Searches and Seizures Key 7(20)

Customs agent's entry into leased aircraft, which pilot indicated would be used to transport marijuana, for purpose of installing a special transponder, but before the transponder became operational, was a search subject to Fourth Amendment protection; agent was seeking entry into the plane with expectation that evidence would later be obtained. U.S.C.A. Const. Amend. 4.

6. Searches and Seizures Key 7(26)

Standing of defendants, charged with importation of marijuana, to contest search of aircraft in which the marijuana was found was dependent upon whether defendants were in the plane at time of search, alleged a proprietary or possessory interest in it or were charged with possession of or a possessory crime involving evidence seized at time of the search. 18 U.S.C.A. §2; Comprehensive Drug Abuse Prevention and Control Act of 1970, §§1002, 1005, 1010, 1013, 21 U.S.C.A. §§952, 955, 960, 963; U.S.C.A. Const. Amend. 4.

7. Searches and Seizures Key 7(26)

Defendants, charged with various offenses relating to marijuana smuggled into the country by aircraft, did not have standing to challenge entry into aircraft, for purpose of installing special transponder, on ground that two of their number were charged with possession of the substance and all were accused of importing or aiding and abetting importation since the entry took place one month before seizure and one month prior to date indictment charges possession and importation; defendants were not charged with a possessory crime at time of search. 18 U.S.C.A. §2; Comprehensive Drug Abuse Prevention and Control Act of 1970, §§1002, 1005, 1010, 1013, 21 U.S.C.A. §§952, 955, 960, 963; U.S.C.A. Const. Amend. 4.

8. Searches and Seizures Key 7(26)

Standing to challenge a search is not conferred merely because a defendant claims prejudice through introduction of evidence gathered in the search. U.S.C.A. Const. Amend. 4.

9. Searches and Seizures Key 7(26)

Standing questions are not resolved on the basis, or according to the contours, of the law of property; a defendant has standing to challenge a search and seizure when a proprietary interest creates privacy expectations. U.S.C.A. Const. Amend 4.

10. Searches and Seizures Key 7(26)

For purpose of standing to contest a search, one who merely finances the leasing of an airplane does not have reasonable expectations of privacy as to the plane. U.S.C.A. Const. Amend. 4.

11. Searches and Seizures Key 7(26)

By itself, contention that defendants were engaged in a joint venture at time customs agent entered airplane for purpose of concealing a special transponder, which venture allegedly was evidenced by supplying of cash to pilot for payment of lease, was insufficient to establish standing for purpose of challenging the entry; also, fact that some defendants supplied money would be of no benefit to co-defendants since there is no vicarious assertion of Fourth Amendment rights by those who cannot independently establish standing and a violation of privacy expectations. U.S.C.A. Const. Amend. 4.

12. Criminal Law Key 539(2)

Testimony of a defendant at a suppression hearing is not admissible at trial. U.S.C.A. Const. Amend. 4.

13. Criminal Law Key 394.5(3)

Joint control provides the authority to consent to a search and permits introduction of evidence seized against others though they may not have given their consent to the "waiver" of their rights. U.S.C.A. Const. Amend. 4.

14. Searches and Seizures Key 7(27)

For purpose of determining pilot's authority to consent to placing of special transponder on aircraft, which Government had reason to believe would be used in smuggling marijuana, the Government was initially entitled to rely on the pilot's appearance of authority, even if he was a lessee in name only: as lessee the pilot had at least joint control over the plane and was authorized to give consent to entry and also, as pilot he had special authority independent of whether colessees had a proprietary interest. U.S.C.A. Const. Amend. 4.

15. Searches and Seizures Key 7(27)

Fact that pilot, who was also colessee, decided to inform the Government that aircraft was to be used in smuggling marijuana did not mean that he was unable to consent to placing of special transponder on the aircraft; pilot has at least joint control over the plane and had authority to give consent and gave such consent voluntarily. U.S.C.A. Const. Amend. 4.

16. Searches and Seizures Key 7(20)

In-flight monitoring of aircraft, which pilot stated was to be used to smuggle marijuana and in which customs agents had secreted special transponder, was an exploratory quest for evidence within the purview of the Fourth Amendment. U.S.C.A. Const. Amend. 4.

17. Searches and Seizures Key 7(26)

Though those defendants charged with actual possession of marijuana, which was found aboard aircraft on day it was monitored pursuant to a secreted special transponder, had standing to contest the monitoring those codefendants charged with importation were not entitled to "automatic standing" on ground that they were charged with a possessory crime. 18 U.S.C.A. §2; Comprehensive Drug Abuse Prevention and Control Act of 1970, §§1002, 1005, 1010, 1013, 21 U.S.C.A. §§952, 955, 960, 963; U.S.C.A. Const. Amend. 4.

18. Searches and Seizures Key 7(20)

Monitoring of aircraft by way of special transponder which had been secreted aboard the aircraft by customs agent did not violate any reasonable expectations of privacy since government regulations required that such an aircraft be equipped with transponders; furthermore, belief that the required transponders had been turned off during flight and, consequently, that defendants' subjective expectation of privacy was violated was of no moment since, although defendants may have hoped that movement of the plane would go unnoticed, their expectations of privacy were to be judged by an objective standard. U.S.C.A. Const. Amend. 4.

19. Searches and Seizures Key 7(20, 26)

Interception of aircraft at landing site, detention and seizure of equipment and personnel in immediate area and seizure of a ton of marijuana constituted a search and seizure within purview of the Fourth Amendment; defendants present at time and place of the seizure had standing to challenge its validity. U.S.C.A. Const. Amend. 4.

20. Searches and Seizures Key 7(26)

For search and seizure purposes, importation of marijuana is not a crime for which possession is an essential element; hence, those defendants not arrested in immediate vicinity of aircraft, from which marijuana was seized, i.e., those arrested some distance away or on indictment charging importation, did not have automatic standing to contest the seizure. 18 U.S.C.A. §2; Comprehensive Drug Abuse Prevention and Control Act of 1970, §§1002, 1005, 1010, 1013, 21 U.S.C.A. §§952, 955, 960, 963; U.S.C.A. Const. Amend. 4.

21. Customs Duties Key 126

An otherwise permissible customs inspection may be tainted by previous illegal governmental activity. U.S.C.A. Const. Amend. 4.

22. Customs Duties Key 126

Issues whether interception of aircraft at small Pennsylvania airport was functional equivalent of a border search and reasonable ground to believe that customs laws were being violated were to be judged according to information known to customs agent at time he gave the signal for the interception and seizure. U.S.C.A. Const. Amend. 4.

23. Customs Duties Key 126

For purpose of determining whether information supplied by aircraft pilot could be used in determining whether customs laws were being violated, no showing of past reliability was necessary where it appeared that pilot merely stepped forward on the one occasion to assist governmental agents and was not a paid informant or cooperating with the Government to obtain leniency for criminal conduct. U.S.C.A. Const. Amend. 4.

24. Customs Duties Key 126

United States Customs Service may make investigatory stops and searches at the international borders and at loca-

tions that are the "functional equivalent" of the border. U.S.C.A. Const. Amend. 4.

25. Customs Duties Key 126

Since customs agents in charge of intercepting aircraft had a reasonable basis for believing that the flight, which terminated at Pennsylvania airport, was international, interception of the aircraft following landing was the functional equivalent of a border search, notwithstanding that the airport did not have routine customs operations. U.S.C.A. Const. Amend. 4.

26. Customs Duties Key 126

Where, among other things, customs agent knew that a general declaration had been filed in Miami indicating an intention to fly to South Caicos, that the aircraft landed in South Caicos, that a second declaration had been filed indicating another foreign destination, that pilot had been hired to fly contraband to northeastern Pennsylvania, that aircraft was being monitored while traveling from South Carolina to Mount Pocono and had not cleared customs elsewhere, there was a reasonable basis from which customs agent could conclude that an international flight had occurred and that a customs inspection was called for. U.S.C.A. Const. Amend. 4.

27. Customs Duties Key 126

Extent of financial backing of alleged marijuana-smuggling operation was entitled to consideration in determining existence of reasonable suspicion that customs laws were being violated but was not alone a reliable indication that an international flight had occurred; similarly, tip from airport manager that unloading might be a "little bit illegal" because of lack of unloading certificates would not alone establish that the flight was international or that violations

of the customs laws had occurred but would help provide probable cause for seizure if seizure were not otherwise supportable as a customs inspection. U.S.C.A. Const. Amend. 4.

28. Customs Duties Key 126

Customs agents acting at places that are not the functional equivalent of the border may make searches and seizures only on probable cause. U.S.C.A. Const. Amend. 4.

29. Criminal Law Key 394.4(12)

Customs Duties Key 126

Where there was a basis independent of monitoring of aircraft for believing that an international flight had occurred, any taint due to entry of aircraft for purpose of installing special transponder or because of monitoring the flight would be attenuated and suppression of marijuana seized on search of aircraft at functional equivalent of the border would be justified; test was not whether but for use of secreted transponder the seizure would not have been made since it was only required to be shown that the subsequent seizure had an independent basis. U.S.C.A. Const. Amend. 4.

30. Customs Duties Key 126

Since interception of aircraft took place at functional equivalent of the border, the investigatory stop and seizure of marijuana was required to be supported only by a reasonable suspicion or reasonable basis on part of customs agent to believe that a violation of the customs laws was taking place; since a border interception was involved, there was no requirement that a warrant be obtained or that probable cause exist. U.S.C.A. Const. Amend. 4.

31. Arrest Key 63.1
Searches and Seizures Key 3.3(2), 7(27)

At places which are not at the border or its functional equivalent, investigatory stops can also be made on reasonable suspicion, but searches and seizures must be supported by probable cause or consent. U.S.C.A. Const. Amend. 4.

32. Custom Duties Key 126

Where, among other things, airport manager told customs agent that extensive preparations were being made for landing of an aircraft carrying marijuana, agent was informed that trip would involve international transportation and that plane had landed and taken off from South Caicos and agent monitored suspicious landing and unloading operations in remote area of small, generally noncommercial airport in the middle of the night and no arrangement had been made for special customs check, the agent, who ordered plane searched, had a reasonable suspicion that customs laws had been violated. U.S.C.A. Const. Amend. 4.

33. Arrest Key 63.4(16)

Where interception of aircraft took place at functional equivalent of the border and customs agents had reasonable suspicion that a violation of customs laws was taking place and search of aircraft disclosed presence of a large quantity of marijuana, there was sufficient probable cause to arrest those engaged in the actual unloading operations. 18 U.S.C.A. §2; Comprehensive Drug Abuse Prevention and Control Act of 1970, §§1002, 1005, 1010, 1013, 21 U.S.C.A. §§952, 955, 960, 963.

34. Arrest Key 63.4(6)

Although arrestees not engaged in actual unloading of smuggled marijuana from aircraft, arrests of two persons in van traveling on access highway and individual found in guard shack at small noncommercial airport were based on probable cause where agents had been informed that van would be used in smuggling operation, van was equipped with CB radio and made several passes at entrance to the airport, airport manager stated that guard shack had been used during trial run, arrests occurred at nearly 3 A.M. in middle of snowstorm and as officer approached guard shack its occupant began to run. 18 U.S.C.A. §2; Comprehensive Drug Abuse Prevention and Control Act of 1970, §§1002, 1005, 1010, 1013, 21 U.S.C.A. §§952, 955, 960, 963.

S. John Cottone, U.S. Atty., Scranton, Pa., for plaintiff.

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MEMORANDUM AND ORDER

NEALON, Chief Judge.

Defendants in this three-count indictment have filed individual and omnibus motions[1] to suppress the fruits of "electronic surveillance" and to suppress the fruits of allegedly illegal arrests, searches, and seizures.[2] Defendants are charged with conspiracy, importation of a controlled substance, and possession of a controlled substance (marijuana): all defendants are charged in the conspiracy and importation counts, *see* 18 U.S.C. §2; 21 U.S.C. §§952, 960 & 963; only defendants Tussell and Sadowsky are charged in the possession count, *see* 21 U.S.C. §955. These charges

1. The individual motions to suppress were filed by defendant Mike Nelson.

2. Eleven defendants have been arraigned. A twelfth defendant has not been apprehended.

are the result of arrests, searches, and seizures made at or in the vicinity of an airport in Mount Pocono, Pa. after an unscheduled landing by a DC-6 in the early morning hours of December 13, 1976. Arrested at or in the vicinity of the airport were defendants Tussell, Sadowsky, Laurie, Whalen, Massaro, Cutler, Nils Nelson, and Powell. The aircraft was traced with the assistance of an electronic tracking device known as a "transponder" that had been surreptitiously installed in the plane by a Customs Agent. An evidentiary hearing was held on July 28, 1977 to consider the suppression motions.

[1, 2] Since the arrests, searches, and seizures were conducted without warrants, the government had the burden at the hearing of going forward with its proof. *See Bumper v. North Carolina*, 391 U.S. 543, 548, 88 S. Ct. 1788, 20 L.Ed.2d 797 (1968); 5 L. Orfield, Criminal Procedure under the Federal Rules § 41.54, at 744 & n.13.5 (Supp. 1976). The government's evidence consisted of three exhibits and the testimony of two Customs Agents (William Hamilton and Charles Wunder) and two Pennsylvania State Troopers assigned temporarily to Customs. The government did not produce, and was not required to produce, the informant who purportedly consented to the installation of the transponder and who piloted the plane. *See McCray v. Illinois*, 386 U.S. 300, 87 S. Ct. 1056, 18 L.Ed.2d 62 (1967); *United States v. Freund*, 525 F.2d 873, 876-77 (5th Cir. 1976) (unidentified informant).

[3] The testimony heard often contained elements of hearsay which might have been excluded at trial but which I allowed for whatever probative value that testimony had. This is permissible at a suppression hearing without regard to the matter in issue, although the court remains obligated to weigh the evidence and discount that which is less reliable.[3] *See* Fed. R. Evid. 104(a) & 1101(d)(1); *United States v. Matlock*, 415 U.S. 164, 172-75, 94 S. Ct. 988, 39 L.Ed.2d 242 (1974); *United States v. Lee*, 541 F.2d 1145 (5th Cir. 1976). Defendants offered no testimony or evidence of their own.

[4] Consent relating to the installation of the transponder was the primary issue that involved hearsay testimony. In this case neither the government nor the defendants called the aircraft's pilot, who had allegedly given consent.[4] Defendants argued at the hearing that the nature of consent requires first hand testimony from the person allegedly giving consent. The Federal Rules of Evidence, however, make no such distinction and permit the use of hearsay testimony without regard to the issue involved. *See* Fed. R. Evid. 104(a) & 1101(d)(1); *Matlock*, 415 U.S. at 172-75, 94 S. Ct. 988; *Lee*, 541 F.2d at 1146. Moreover, in cases where the consent of a *defendant* is in issue, it is obvious that, although the government cannot compel the defendant's testimony, the court is not disabled from nevertheless determining defendant's consent. The crucial question is not what the matter in issue is but rather what probative value the proffered testimony has.

The hearing consumed day and evening sessions on July 28, 1977; the hearing transcript consists of more than 400 pages of testimony. At the close of the hearing I set a schedule for the filing of post-hearing briefs supporting and opposing the motions to suppress. At defendants' request, a brief filed September 12, 1977 by counsel for defendant LaBate is being treated as an omnibus brief filed on behalf of all defendants. In addition, individual briefs were filed by defendants Tussell and Mike Nelson.

3. Similarly, I permitted the introduction into evidence without formal authentication of photostated copies of the general declarations executed by crew of the DC-6 and a copy of the lease agreement governing use of the aircraft during all material times.

4. *See* note 24 *infra*.

The government sought and received an extension of time within which to respond; its opposing brief was filed October 13. Defendant LaBate sought and received an extension of time within which to file a reply brief; this brief was filed November 3. The suppression motions are now ripe for determination, and they will be denied for the reasons that follow.

Finding of Fact

On or about November 3, 1976, Charles Wunder, an Agent for the United States Customs Service working on various investigations in the Mount Pocono, Pa. area, was approached by the manager of the Mount Pocono Airport. The manager, a Mr. Carl Nassauer, advised Wunder that he had been contacted by certain persons in an effort to enlist his cooperation for illegal activities. Throughout early November, Wunder testified, Nassauer was in frequent communication with him on a confidential basis. Nassauer had been told by these persons that a large plane would require a landing place in an isolated area of the airport, that 600 gallons of fuel would be needed,[5] that the plane would be involved in some unloading described as being a "little bit illegal" because of the lack of federally required unloading certificates, and that he would be well taken care of for his help. The money for the purchase of the fuel was brought to Nassauer by a person who flew in specially from Florida for that purpose. (N.T. 188, 193, 226, 236-38, 274-75, 326-28). Sometime after November 12, 1976, Nassauer communicated to Wunder his belief that the unloading might involve marijuana (N.T. 239, 334). The financial backing the operation was receiving caused Wunder to believe also that narcotics were likely to be involved (N.T. 238).

5. Wunder was not aware of the range 600 gallons of fuel would provide. (N.T. 348). It is not a matter of record, however, where the airplane was headed after departing Mount Pocono.

At about the same time a separate investigation was underway in Florida. William Hamilton, an Air Officer for the Custom Service assigned to the Miami Air Support Branch, testified that, on November 12, 1976, he was called to the office of his supervisor, a Mr. Ragan, who is Chief of the Law Enforcement Section in Miami, and introduced to a Mr. Reds Mettrick. The witness, Mr. Hamilton, had not seen Metrick arrive, and had no idea of what transpired during earlier portions of the meeting between Mettrick and Ragan. Ragan indicated that Mettrick was a pilot who had leased an aircraft,[6] and that Mettrick had consented to the installation of a special transponder in that craft.[7] Mettrick was not under arrest; there is no proof in the record as to whether Mettrick appeared voluntarily or was requested to appear at the Customs Office. When Ragan asked Mettrick to confirm his willingness to have the transponder installed, Mettrick replied something to the effect, "Yes. Go ahead and install the transponder." (N.T. 15, 69, 72-73, 78-79, 100, 109). Mettrick mentioned the possibility that the plane's cargo would be marijuana, destined for transport to northeastern Pennsylvania (N.T. 82, 97, 135). A rather detailed discussion between the witness, Mr. Hamilton, and the pilot, Mr. Mettrick, ensued during which technical questions relating to the mechanics of installing the transponder in the craft were discussed. Mettrick answered most to Hamilton's satisfaction. After the meeting Hamilton confirmed that Mettrick was a licensed pilot by checking "microfiche" files near the conference room. That evening, at about 9 P.M., Hamilton

6. *See* Government's Exhibit # 3. A lease, not available to the Customs Agents at that time, was introduced in evidence at the hearing to substantiate Mettrick's status as lessee of a DC-6 aircraft. Wunder conceded on cross-examination that Mettrick's subsequently prepared formal statement acknowledged that the money used to lease the plane was provided by some of the defendants.

7. A transponder is a device which emits identifying information when "interrogated" electronically by ground control stations. *See* discussion *infra.*

surreptitiously installed the transponder in the DC-6. While transponders are normally located in plain view, he installed the special transponder in such a fashion as to make it difficult to locate visually. This method of installation left unaffected the operation of the existing "primary" and "backup" transponders that are required by Federal Aviation Administration regulations [8] (N.T. 11, 32, 43, 95-96, 109).

FAA regulations require that planes above a certain size, such as a DC-6, carry both primary and backup transponders in order to provide information from which the plane's location, groundspeed, airspeed, and direction can be determined. In ordinary operation, a pilot is instructed by ground control to set the transponder being used to a specific identifying frequency. An automatic signal from ground control "interrogates" the transponder to obtain the desired information. The special transponders in use by the Customs Service emit a preset frequency, common to all such transponders, that cannot be adjusted while in use. A special transponder was installed in the DC-6 because of the belief that, should the plane be used in smuggling operations, the persons involved might turn off the primary and backup transponders (N.T., 8-9, 12, 29, 36, 120, 152).

After the installation of the transponder on November 12, 1976, the DC-6 remained in the Miami vicinity for about one month. One brief flight was taken during this time with the pilot-lessee, Mr. Mettrick, at the controls. Although described by the witness Hamilton as a "test flight," presumably to permit certain persons to assure themselves of the aircraft's operability, the flight also enabled the Customs Agents to confirm that the transponder was functioning correctly (N.T. 142-43).

8. *See* 14 C.F.R. § 91.24 (1976).

The events in Florida and Pennsylvania were linked together by Wunder's discovery, on November 12, that the name of one of the defendants (Tussell) had surfaced in both investigations. Thereafter, Wunder kept in close contact with the Customs Agents conducting the Florida investigation. From those Agents he learned that international smuggling of a controlled substance could be involved and that a DC-6 was intended for use in the operation (N.T. 188-89, 191-92, 223-24, 234, 240-41).

The cooperative arrangement between Wunder and his confidential informant Nassauer also continued. Nassauer alerted Wunder to a "trial run" which was to be conducted at night during the Thanksgiving weekend. The trial run (personally monitored by Wunder) and the many conversations Nassauer had with several persons connected with the planning for the landing enabled Wunder to develop a list of persons by name or description and a list of vehicles and license plate numbers. In this matter Wunder also learned that these persons were equipping themselves with flares and citizens' band radios. The trial run involved the landing of a small private plane, and the coordinated movement of various vehicles to the isolated area of the Airport where the plane set down. During the trial run a "guard shack" was manned by one of the participants, apparently as a lookout. On a "half dozen" other occasions, Wunder secretly observed the airport in hopes that he could be present during the actual landing of the DC-6. On December 12, Nassauer informed him that the landing was scheduled for that evening (N.T. 186-88, 197-98, 207, 273, 277, 360-69, 372, 376-77). Thereafter, Wunder heard from the Customs Agents in Florida that the plane had indeed departed.

After the filing of a general declaration by the pilot Mettrick indicating a destination of South Caicos, Bahamas,[9]

9. *See* Government's Exhibit # 1. While a flight plan may be given verbally, a general declaration is a formal statement by the pilot of the plane that the craft is departing from or returning to the United States. (N.T. 169).

the DC-6 left Miami on December 12, 1976 in the anticipated southeasterly direction. The flight was monitored until the plane was beyond the 300-mile range of the Miami air-traffic control equipment; South Caicos is located outside the United States, about 520 miles from Miami.[10] There was testimony that Miami Customs confirmed by phone the arrival of the DC-6 in South Caicos. The general declaration filed there showed a destination of "St. Lucia" on its next flight[11] (N.T. 18-21, 64, 79-80, 243).

Wunder began final work on assembling a team to intercept the DC-6 upon its arrival at the Mount Pocono Airport. His team consisted of Customs Agents, Agents of the Drug Enforcement Administration, and members of the Pennsylvania State Police assigned specially to the Customs Service. A meeting was held at Wunder's home in Mount Pocono at 6 P.M., December 12 to disseminate descriptions of persons and vehicles expected to be involved in the operation and to make assignments of responsibilities for the interception (N.T. 86-88, 207, 297). The plan formulated at the meeting involved seizing and inspecting the contents of the aircraft, and holding persons found at the airport or in vehicles or places thought to be connected with the operation.[12] To that end, some of the seventeen members of the interception team positioned themselves around the isolated area of the airport that was expected

10. As indicated *supra*, all transponders in use by the Customs Service are preset to the same frequency. Two other transponders in use by Customs in the Miami area were accounted for by Hamilton, and could not have been mistaken for the DC-6 in question. (N.T. 139-41).

11. *See* Government's Exhibit # 2. The exhibit was photostated from the original with a receipt obscuring the space used on the first page to show destination. The Court has obtained an unobscured copy of the first page and has appended this copy to the exhibit. The information in this general declaration was available to the Customs Agents at that time and communicated to Agent Wunder at Mount Pocono. (N.T. 243-44).

12. This "holding" was described by Agent Wunder variously as detention and as arrest; his characterization of these actions does not control the determinations here.

to be used in the landing and had been used in the "dry run" over Thanksgiving. Others were assigned patrols on the adjacent access highway (Route 611) or in other airport areas. All remained hidden from view and maintained radio silence except for certain prearranged signals. There was no other air traffic because of the size of the airport[13] and the lateness of the hour. At least by the time the DC-6 arrived, the airport was under a heavy snowstorm with high winds (N.T. 202, 205, 207, 210-11).

After loss of the plane's transponder signal 300 miles from Miami and telephonic confirmation of arrival in South Caicos, the D-6 was not monitored again until it reached a point 20 miles east of Charleston, S.C. The Traffic Control Center in Washington, D.C. reported to the Customs Service the monitoring of a plane with the distinctive signal of the special transponder. The plane was observed heading in the general direction of Mount Pocono Airport; it made no other stops en route. The monitoring of the craft gave the Customs Agents, and in particular Mr. Wunder, reason to believe the DC-6 was returning to the United States and would make its first stop within the borders of the United States at the Mount Pocono Airport. The monitoring also enabled the Customs Agents to determine an estimated time of arrival. But it is equally clear that, had the transponder malfunctioned after its installation in Miami, because of the tip received from Nassauer on December 12 and because of separate information developed by the Florida investigation, Customs Agents would have been in position at Mount Pocono Airport on that night to intercept the DC-6 in the belief that it carried contraband (N.T. 22, 79, 199, 280). Customs Agents were operating primarily on information from the Florida and Mount Pocono investigations that existed independently of that

13. The Mount Pocono Airport is a small, noninternational airport with little, if any, commercial traffic.

gained by the installation of and monitoring with the special transponder (N.T. 166, 187).

At about 1 A.M. on December 13, the DC-6 landed at Mount Pocono Airport. The plane had appeared suddenly causing Wunder to leap behind a snowbank to escape detection. The members of the team kept their positions. From Wunder's position, about 350 feet from the runway where the plane had come to rest, he observed a station wagon pull up to the plane and two men exiting from the plane and departing in the vehicle. Subjectively, Wunder felt that, although technical violations of FAA regulations were fairly certain,[14] he had not seen anything indicative of a cargo and that, once unloading was in progress, there would be several more violations. Shortly before 3 A.M., vehicles (gas trucks, rental vans, and a Mercedes automobile) began pulling up to the plane and persons began unloading bales of an unknown material. After 20 to 30 bales had been transferred into a van,[15] Wunder gave the signal by radio for the members of the team to "close in" according to their prearranged assignments (N.T. 165, 188-90, 201-03, 212, 355).

Twelve members of the team closed in on the plane and immediately adjacent vehicles. As Wunder rushed forward, and reached a point about 100 feet from the aircraft, he noticed a pungent odor which he identified, on the basis of his experience, as being marijuana. Wunder's shouts to persons in the vicinity of the plane went unheeded because of the noise caused by the severity of the storm. He also observed a person who appeared to be reaching for a gun. Wunder fired a warning shot upwards which, because of his position under the wing of the plane, required him to lean backwards somewhat. A second shot was fired by

14. Wunder testified that the Customs Service enforces the laws of other federal agencies as well. (N.T. 222, 229-30).

15. This was estimated to be one-third of the total number of bales brought in the plane. (N.T. 203).

another agent who mistakenly thought that Wunder had been fired upon[16] (N.T. 203, 205-06, 312-13).

The first objective of the team was to detain and seize all equipment and personnel in the area. At some point during or immediately after the completion of this process, Wunder observed seeds and several broken bales. Five persons were arrested in the immediate vicinity of the plane.[17] In addition to the plane, the team seized eight tons of marijuana,[18] a Mercedes car, a station wagon, a van, and various items of equipment including radios and police scanners (N.T. 164, 203-04, 216).

When the signal to close in was given over the radio by Wunder, the remaining members of the team carried out their assignments in other areas of the airport or on the adjacent access highway (Route 611). Pennsylvania State Trooper James Margle testified that his assignment was to arrest any person found occupying the "guard shack" that had reportedly been used during the trial run. As the police vehicle in which Margle was a passenger pulled up rapidly to the shack, a person emerged and began running away from the officers.[19] He was ordered to stop and was handcuffed at gunpoint (N.T. 386-88, 391-92).

Other agents (including Corporal Ralph Marinetti of the Pennsylvania State Police) who were assigned to patrol Route 611 had, prior to the signal, observed a van with a Florida registration that matched one of the license numbers provided to the team at the 6 P.M. meeting. Corporal Marinetti testified that the vehicle was observed at about 2:30 A.M. travelling north along Route 611 (the access highway for the Mount Pocono Airport). The van appeared to be equipped with citizens' band (CB) equip-

16. There was no evidence that any of the defendants arrested carried a weapon.

17. These defendants were Tussell, Sadowsky, Laurie, Whalen and Massaro.

18. Count III of the indictment charges possession of approximately five and one-half tons.

19. It is not a matter of record whether the officer was in uniform at the time. The person arrested was the defendant Cutler.

ment. The agents followed the van, which drove one-quarter mile past the airport entrance before making a "U-turn" and proceeding south. The van again passed the entrance and made another U-turn. While the van was travelling north again, the agents received Wunder's signal. The agents stopped the van and, after being joined by other members of the interception team, arrested the occupants (N.T. 283-86, 297, 372, 377-81). The persons arrested had first names which matched names familiar to agent Wunder,[20] but it is clear that by this time the van occupants were already under arrest (N.T. 293).

There is nothing in the record to indicate that any evidence probative of guilt was seized at the time of the guard-shack and van arrests. These arrests were not made in the immediate vicinity of the landing site.

Discussion

My examination of the legal issues here necessitates analyses of four separate events: (1) the entry into the DC-6 made on November 12, 1976 in order to install a special transponder; (2) the monitoring of the DC-6 in flight on December 12 and 13, 1976; (3) interception of the DC-6 by Customs Agents early on December 13, and the seizure of incriminating evidence; and (4) the arrests of those defendants found at or nearby the landing site. Except for the possibility that illegality of action in one of these events may taint what would otherwise be legal governmental conduct in another, *see generally Wong Sun v. United States*, 371 U.S. 471, 491, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963), each of these events must be examined separately to insure compliance with the Fourth Amendment to the Constitution.

Defendants have not established their standing to contest the constitutionality of the entry into the plane. Assuming, however, that all the defendants could establish standing through a proprietary interest in the lease of the aircraft, I find that the pilot of the aircraft, Mettrick, had the authority to, and did in fact, consent to the entry of the Customs Agents into the DC-6. As to the monitoring through the use of the special transponder, all but two of the defendants have failed to establish their standing. Again assuming instead that all of the defendants have standing, I hold that this monitoring violated no reasonable expectations of privacy because of the customary monitoring of planes in flight that is conducted by air traffic control stations. Even assuming arguendo that one or both of these reasonable governmental intrusions were violative of the Fourth Amendment, I would conclude that their taint was so attenuated as to not require suppression of the fruits of the third "intrusion"—the interception and seizure. I find further that the interception of the DC-6 occurred at the functional equivalent of the border and was based upon a reasonable suspicion of illegal activity. Because reasonable grounds existed, the Customs Agents were justified in searching the plane and the vehicles in the immediate vicinity of the plane, in seizing contraband, in detaining person found there. Finally, I conclude that the arrests of the persons in the immediate vicinity of the aircraft and the arrests of persons in another area of the airport and on the adjacent access highway were all conducted with probable cause.

20. Defendants Powell and Nils Nelson were arrested at this time.

Entry into the Aircraft

[5] The entry into the DC-6 for the purpose of installing the special transponder (but before the transponder became operational) was a search subject to Fourth Amendment protection. *See United States v. Pretzinger*, 542 F.2d 517, 520 (9th Cir. 1976); *United States v. Hufford*, 539 F.2d 32. 34 (9th Cir.), *cert. denied*, 429 U.S.

1002, 97 S.Ct. 533, 50 L.Ed.2d 614 (1976). Obviously, Agent Hamilton was seeking entry into the plane with the expectation that evidence would later be obtained. *See Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 2d 576 (1967); *People v. Smith*, 67 Cal.App.3d 638, 136 Cal.Rptr. 764, 771 (5th App.Dist.1977). Since it is clear that Fourth Amendment rights are involved, I must determine who has standing to challenge the search and whether, as the government contends, there was consent given by Mettrick.

[6-12] Defendants' standing to contest the search is dependent upon whether defendents were in the plane at the time of search, allege a proprietary or possessory interest in the DC-6, or are charged with possession of (or a possessory crime involving) evidence seized *at the time of the search*. *See Brown v. United States*, 411 U.S. 223, 228-29, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973) (Burger, C. J., for an unanimous Court). *See also United States v. Oates*, 560 F.2d 45 (2d Cir. 1977) ("automatic standing" for person present at time of search and charged with possessory crime). *Cf. Jones v. United States*, 362 U.S. 257, 265, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960) (interest in the premises or presence at the time of search establishes standing). There is no indication that any of the defendants were present when the plane was entered. Defendants argue that standing accrues from the fact that two of the defendants are charged with possession of a controlled substance and all the defendants are accused of importing or aiding and abetting importation, a crime which defendants contend contains an element of possession. *Compare United States v. Valencia*, 492 F.2d 1071, 1074 (9th Cir. 1974) and *United States v. Felix*, 474 F.2d 610 (9th Cir. 1973), with *Ortiz v. United States*, 329 F.2d 381 (5th Cir. 1964). Since the search (entry into the DC-6) took

place on November 12, one month before the seizure of the controlled substance and one month prior to the date the indictment charges defendants with possession and importation (December 12, 1976), defendants are not charged with a possessory crime at the time of search and do not, on this ground, obtain standing. *See Brown*, 411 U.S. at 227-28, 93 S.Ct. 1565 (possession two months *before* challenged search did not give standing). Standing is not conferred merely because a defendant claims prejudice through the introduction of evidence gathered in a search. *Jones*, 362 U.S. at 261, 80 S.Ct. 725. Defendants also argue standing on the ground that they had a possessory interest in the airplane. Little evidence was adduced on this matter.[21] It is their contention that they supplied the money with which Mettrick leased the DC-6 and that Mettrick was the lessee "in name only."[22] Standing questions are not resolved on the basis, or according to the contours, of the law of property; a defendant has standing when a proprietary interest creates privacy expectations. *See Jones*, 362 U.S. at 263-67, 80 S.Ct. 725. One who merely finances the leasing of a plane does not have reasonable expectations of privacy as to that plane. *See United States v. McConnell*, 500 F.2d 347 (5th Cir. 1974), *cert. denied*, 420 U.S. 946, 95 S.Ct. 1327, 43 L.Ed.2d 424 (1975) (status as a creditor of a lessee). *See also United States v. Holmes*, 537 F.2d 227, 232 (5th Cir. 1976) (*en banc*) (dissenting opinion joined by seven Judges), *citing United States v. Nunn*, 525 F.2d 958 (5th Cir. 1976). Defendants' contention, however, appears to be that they were each engaged in a joint venture at the time of the entry into the DC-6 as evidenced by the supplying of cash to Mettrick for the payment of the lease.[23] This contention, by itself and without

21. *See* note 6 and accompanying text *supra*.
22. Defendants' Omnibus Reply Brief filed Nov. 3, 1977 at 6.
23. The fact that some defendants supplied money would be of no benefit to their codefendants; there is no vicarious assertion of Fourth Amendment

proof at the suppression hearing, is vague and conclusory and insufficient to establish standing. *See United States v. Guerrera*, 554 F.2d 987, 990 (9th Cir. 1977). Although defendants have not demonstrated standing, it will be assumed for the purpose of reaching the remaining issue with regards to entry into the DC-6.

[13, 14] Mettrick had the authority to consent to entry into the plane and in fact consented to the entry Hamilton made. Joint control provides the authority to consent to a search, and permits the introduction of evidence seized against others though they may not have given their consent to the "waiver" of their rights. *See United States v. Phifer*, 400 F.Supp. 719, 732-33 (E.D.Pa.1975) (citing cases). At the time Mettrick's consent was sought, it was known that he was the pilot and lessee, even if in name only, of the plane. At least initially, the government is entitled to rely reasonably on the appearance of authority. *See id.* at 733. These appearances are amply supported in this record as fact. As lessee Mettrick had at least joint control over the plane and was authorized to give consent to the entry. *See United States v. Matlock*, 415 U.S. 164, 169-72, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974); *United States v. Murphy*, 506 F.2d 529 (9th Cir. 1974) (per curiam) (employee with authority to consent), *cert. denied*, 420 U.S. 996, 95 S.Ct. 1433, 43 L.Ed.2d 676 (1975). *Compare United States v. Abel*, 548 F.2d 591 (5th Cir.), *cert. denied*, 431 U.S. 956, 97 S.Ct. 2678, 53 L.Ed.2d 273 (1977), with *People v. Smith*, 67 Cal.App.3d 638, 136 Cal. Rptr. 764 (5th App.Dist.1977). Defendants' arguments to the contrary notwithstanding, as pilot of the craft, Mettrick had, in addition, special authority independent of whether the defendants had a proprietary interest under *Jones*. *See* 14 C.F.R. §91.3 (1976) (pilot is the "final authority" as to the operation of a plane). *Cf. Phifer*, 400 F.Supp. at 733 (acquiescence of employer-lessee).

rights by codefendants who cannot independently establish standing and a violation of privacy expectations. *Alderman v. United States*, 394 U.S. 165, 171-76, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969). In this regard it should be noted that the testimony of a defendant at a suppression hearing is not admissible at trial. *Simmons v. United States*, 390 U.S. 377, 389-94, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968).

[15] There is no evidence of any coercion in the obtaining of Mettrick's consent for the entry; under these circumstances I can only conclude that his consent was freely and voluntarily given. It is not a matter of record whether Customs asked Mettrick to appear or whether Mettrick made a unilateral decision to cooperate with Customs by revealing to them his confidential information. Mettrick's consent appeared absolute when Hamilton entered the conference room; nothing in their lengthy conversation thereafter indicated any unwillingness on Mettrick's part. *See United States v. Watson*, 423 U.S. 411, 424-25, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976); *Schneckloth v. Bustamonte*, 412 U.S. 218, 224-29, 93 S.Ct. 2041, 36 L.Ed. 2d 854 (1973); *United States v. Griffin*, 530 F.2d 739, 742-43 (7th Cir. 1976). Defendants argue that as an informer for the government Mettrick's consent should not be recognized.[24] In essence they argue that Mettrick is an informer because he gave information and consent for the search, but that he could not give consent because he was an informer. By this reasoning, all persons with joint control over premises sought to be searched would be disqualified from giving consent by the very fact that consent was given. Mettrick had the authority to give consent and gave that consent voluntarily.

24. There was no evidence that Mettrick was acting as an agent of, as opposed to any informer for, the Customs Service. Although there was some confusion as to whether the government intended to call Mettrick to the stand, on several occasions during the suppression hearing the Court offered defendants a continuance to locate and subpoena Mettrick, but they declined these offers.

Monitoring of the DC-6 in Flight

[16] The DC-6 was monitored while in flight, first heading from Miami to a point 300 miles away in the direction of South Caicos, and again heading from a point 20 miles east of Charleston, S.C. to the landing site at Mount Pocono. As with the entry into the DC-6 to install the special transponder, the monitoring of the DC-6 in flight was an exploratory quest for evidence within the purview of the Fourth Amendment. *See Hufford*, 539 F.2d at 33; *United States v. Holmes*, 537 F.2d 227 (5th Cir. 1976) (per curiam) *aff'g by an evenly divided court en banc*, 521 F.2d 859 (5th Cir. 1975); *United States v. Bobisink*, 415 F. Supp. 1334, 1339 (D. Mass. 1976). *See generally* 22 Vill. L. Rev. 1067 (1977). *Contra, United States v. Pretzinger*, 542 F.2d 517, 520 (9th Cir. 1976) (per curiam) (monitoring by a location device not a search.)[25] Thus, the question now is whether this search, admittedly done without benefit of warrant, was a reasonable one, and, as a preliminary matter, whether each of the defendants has standing to contest the constitutionality of the search.

[17] The standing of each defendant, individually determined,[26] is dependent upon whether he is charged with possession of an illegal substance at the time of the monitoring, was present in the aircraft at that time, or had a proprietary interest in the DC-6 which gave him a reasonable expectation of privacy. *See Brown*, 411 U.S. at 228-29, 93 S. Ct. 1565. The record in this regard is again deficient: some of the defendants might have been able to establish the requisite proprietary interest;[27] and it is apparent that some might have been able to establish their

25. The California court in *People v. Smith*, 67 Cal.App.3d 638, 136 Cal. Rptr. 764 (5th App. Dist. 1977), did not reach the question of whether monitoring was a search, deciding only that the installation of the transponder there violated reasonable expectations of privacy.

26. *See* note 23 *supra*.

27. *See* notes 22-23 and accompanying text *supra*.

presence in the aircraft at the time of the monitoring.[28] Defendants contend that standing is established because they are charged with possessory crimes at the time of the monitoring. Only defendants Tussell and Sadowsky are charged with actual possession; since the indictment charges possession on the day the monitoring occurred, defendants Tussell and Sadowsky have standing to contest the monitoring. *See Brown*, 411 U.S. at 228-29, 93 S. Ct. 1565; *Holmes*, 537 F.2d at 231-33 (*en banc* dissent). As to the other defendants, it is contended that the charge of importation of a controlled substance is a possessory crime, entitling them to "automatic standing." If a conflict in the circuits ever existed,[29] it is clear now that the Courts of Appeals for both the Ninth and Fifth Circuits have adopted the same standard and rejected this position. *See United States v. Guerrera*, 554 F.2d 987 (9th Cir. 1977); *United States v. Gramlich*, 551 F.2d 1359 (5th Cir. 1977); *United States v. Valencia*, 492 F.2d 1071 (9th Cir. 1974).[30] I will assume standing for these additional defendants in order to reach the question of privacy expectations in the monitoring for all defendants.

[18] The monitoring of the plane did not violate any reasonable expectations of privacy. *See generally Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L.Ed.2d 576 (1967). *See also United States v. White*, 401 U.S. 745, 91 S. Ct. 1122, 28 L.Ed.2d 453 (1971) (plurality opinion).

28. When the plane landed, two persons were seen leaving the plane. The pilot, copilot, and flight engineer were found in the cockpit of the craft at the time of the arrests, apparently having never left the craft. These three were detained briefly but never arrested. The two who left the craft could be defendants here, but the record does not disclose who they were.

29. The *Felix* and *Ortiz* cases from the Fifth and Ninth Circuits appeared to be in conflict.

30. The cases from the Ninth Circuit are directly on point. The case of *United States v. Oates*, 560 F.2d 45 (2d Cir. 1977), is clearly distinguishable: the defendant there was present at the time heroin was seized from the person of his codefendent, and was charged with possession of heroin at the time of the seizure.

FAA regulations, discussed supra, require that planes such as a DC-6 be equipped with transponders. In accordance with this regulation, the DC-6 was so equipped. The transponders ordinarily in use and the special transponder placed in the plane by Customs transmit essentially similar information and do not, for example, provide a means of overhearing conversations within the plane. The information supplied during monitoring is integral to the regulation of aircraft flight; the monitoring is an intrusion anticipated and, indeed, welcomed by aircraft passengers. Consequently, there is no reasonable[31] expectation of privacy disturbed by such governmental activities. *Compare United States v. Hufford*, 539 F.2d 32 (9th Cir.), *cert. denied*, 429 U.S. 1002, 97 S. Ct. 533, 50 L.Ed.2d 614 (1976), *with United States v. Holmes*, 537 F.2d 227 (5th Cir. 1976) (per curiam), *aff'g by an evenly divided court en banc*, 521 F.2d 859 (5th Cir. 1975).[32] In addition since none of the defendants had rights violated during the entry to install the transponder, there was no infringement of Fourth Amendment rights by the monitoring. *See Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L.Ed.2d 441 (1963).[33]

31. Defendants argue, apparently on the assumption that the primary and secondary transponders were in fact turned off, that their *subjective* expectations of privacy were violated. While defendants may have hoped that the movement of the plane would go unnoticed, expectations of privacy are judged by objective standards. *See, e.g., Hufford*, 539 F.2d at 33-34.

32. The *Hufford* and *Holmes* cases take opposite views on the question of whether the use of electronic "beepers" in monitoring automobile traffic implicates Fourth Amendment rights. *See generally* 22 Vill.L.Rev. 1067 (1977). Beepers, unlike transponders, are devices that constantly emit a specific signal once they have been activated manually or by vibration and are not associated with a regulatory scheme. Transponders emit a signal only in response to electronic interrogation and are used as part of a regulatory scheme for air traffic safety. Thus the court in *Holmes*, unlike the situation here, was faced with an instance of governmental monitoring without a regulatory scheme that made such monitoring reasonable. Whatever expectation of privacy there may ordinarily be in the passage of an automobile along a public roadway is absent in the flight of a plane along closely monitored airways.

33. Were the regular transponders in an aircraft left operational, the taint of an illegal installation of a special transponder might be too attenuated to require suppression of the fruits of monitoring. Here, it is not a matter of record whether, as Customs had feared, the primary and backup transponders were turned off.

Interception of the DC-6 and Seizure of Marijuana

[19, 20] The interception of the DC-6, the detention and seizure of equipment and personnel in the immediate area, and the seizure of eight tons of marijuana clearly represent a "search and seizure" within the purview of the Fourth Amendment. The defendants present at the time and place of the seizure have obvious standing. *See Brown*, 411 U.S. at 228-29,[34] 93 S. Ct. 1565. Those defendants not arrested in the immediate vicinity of the plane., i.e. those arrested some distance away or on the indictment, contend that the charge of importation gives them "automatic standing" to contest this seizure. Importation is not a crime for which possession is an essential element; these defendants are not afforded standing merely because they face charges of importation. *See United States v. Guerrera*, 554 F.2d 987 (9th Cir. 1977); *United States v. Gramlich*, 551 F.2d 1359 (5th Cir. 1977); *United States v. Valencia*, 492 F.2d 1071 (9th Cir. 1974); *United States v. Felix*, 474 F.2d 610 (9th Cir. 1973).[35] Again, these defendants, who could not establish standing because they were not present at the time of the seizure and have not been charged with a possessory crime, might have sought to show the requisite proprietary interest in the airplane.[36] Since there was insufficient evidence of a joint venture I hold that the three defendants arrested on the indictment and the three arrested in the guard shack and van have no standing to contest the seizure of the marijuana. I will assume arguendo standing for these six de-

34. *See* note 17 and accompanying text *supra*.

35. The case of *Ortiz v. United States*, 329 F.2d 381 (5th Cir. 1964), must be considered to no longer be good law in this regard; the Court of Appeals for the Fifth Circuit has apparently adopted the Ninth Circuit rule. *See Gramlich*, 551 F.2d at 1362-63. *See also*, notes 29-30 and accompanying text *supra*.

36. *See* notes 22-23 and accompanying text *supra*.

fendants in order to reach the question of the constitutionality of the interception for all.

[21-23] The question of whether the interception and seizure are constitutional is dependent upon (1) whether the interception was made at the functional equivalent of the border; and (2) if so, whether there was reasonable suspicion that violations of the customs laws were taking place. Moreover, although I have found that neither the entry to install the transponder nor the monitoring of the plane in flight were violative of the Fourth Amendment, an otherwise permissible Customs inspection may be tainted by previous illegal governmental activity. *See Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L.Ed.2d 441 (1963). Thus, it must also be decided, assuming for the sake of argument that I had found either the entry or monitoring to be illegal, (1) whether the interception would still be considered to have been made at the functional equivalent of the border; and (2) whether there would still be reasonable grounds to believe customs laws were being violated. Obviously, the issues of functional equivalency and reasonable basis must be judged according to the information known to Customs Agent Wunder at the time he gave the signal for the interception and seizure. This information existed in five broad categories: (1) confidential information supplied by Mr. Nassauer, the manager of the Mount Pocono Airport both before and after November 12, 1976—the date of the entry into the DC-6; (2) confidential information, obtained by Customs Agents in Florida and relayed to Wunder after November 12 and before December 12, which resulted from their investigation but not as a consequence of the installation or operation of the transponder;[37] (3) information gained from the use of the transponder in monitoring the flight of the DC-6 on December 12 and 13; (4) information relayed by Customs Agents in Florida on December 12 from sources other than the transponder; and (5) information gained by Wunder's own observations.

37. Much, if not all, of this information was supplied by the pilot Mettrick. There is no showing that Mettrick was a paid informant or cooperating with the government to obtain leniency for criminal conduct he had engaged in. Rather, it would appear that Mr. Mettrick stepped forward on this one occasion to assist governmental agents in the enforcement of federal law. Therefore, past reliability need not be shown.

[24] The United States Customs Service, as part of its broad authority, may make investigatory stops and searches at the international borders and at locations that are the "functional equivalent" of the border. *See Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73, 93 S. Ct. 2535, 37 L.Ed.2d 596 (1973); *United States v. Beck*, 483 F.2d 203, 207-08 (3d Cir. 1973), *cert. denied*, 414 U.S. 1132, 94 S. Ct. 873, 38 L.Ed.2d 757 (1974); *United States v. Glaziou*, 402 F.2d 8, 12 (2d Cir. 1968) (border area elastic; dependent upon factual context), *cert. denied*, 393 U.S. 1121, 89 S. Ct. 999, 22 L.Ed.2d 126 (1969). *See also United States v. Diaz*, 503 F.2d 1025 (3d Cir. 1974) (per curiam).

[25-29] Since the Customs Agent in charge of intercepting the plane, Agent Wunder, had a reasonable basis for believing that the flight was international, the interception was made at the functional equivalent of the border. *See United States v. Ivey*, 546 F.2d 139, 143 (5th Cir. 1977). In the fourth category of information, viz., that obtained on December 12 from sources other than the monitoring of the DC-6 in flight, Agent Wunder knew that a general declaration had been filed in Miami indicating an intention to fly to South Caicos, that the DC-6 had landed in South Caicos (the phone conversation), and that a second general declaration had been filed there indicating another foreign destination. In the second category of information, viz., that obtained from the Florida investigation and connected with the Pennsylvania operation through the name "Tus-

sell," Wunder knew that Mettrick had been hired to fly contraband from a foreign destination to northeastern Pennsylvania. In the third category of information, it was known from the monitoring of the DC-6 that the plane flew 300 miles from Miami toward South Caicos and from South Carolina to Mount Pocono. Clearly, there was a reasonable basis from which Wunder could conclude that an international flight had occurred. There was no information that the DC-6 had cleared customs elsewhere; a customs inspection was clearly called for.[38] *See Ivey*, 546 F.2d at 143; *United States v. Brennan*, 538 F.2d 711 (5th Cir. 1976), *cert. denied*, 429 U.S. 1092, 97 S. Ct. 1104, 51 L.Ed.2d 538 (1977). *See also, United States v. Mirmelli*, 421 F. Supp. 684, 687 (D. N.J. 1976), *aff'd mem.*, 556 F.2d 569 (3d Cir.), *cert. denied*, — U.S. —, 98 S.Ct. 115, 54 L.Ed.2d 92 (1977).[39] Even if the third category of information, viz., that gained by monitoring, were excluded, there was an independent basis, amply supplied by information from the second and fourth categories, for believing that an international flight had occurred. Thus, any taint, were the entry or the monitoring found to be illegal, would

38. Other factors, which will be discussed infra, relate more closely to the question of whether there was a reasonable suspicion that customs laws were being violated. For example, the evident financial backing the operation had would be entitled to consideration in determining whether reasonable suspicion existed, *see Diaz*, 503 F.2d at 1026 n. 1, but would not provide a reliable indication that international flight had occurred. Similarly, the tip from Nassauer that unloading might be a "little bit illegal" because of the lack of FAA-required unloading certificates, would neither tend to show the flight was international nor provide a suspicion that violations of *customs* laws had occurred, but would help provide probable cause for the seizure were that seizure not supportable as a customs inspection. Customs agents, acting at places that are not the functional equivalent of the border, may make searches and seizures only on probable cause. *See, e.g., United States v. Brennan*, 538 F.2d 711, 716-19 (5th Cir. 1976), *cert. denied*, 429 U.S. 1092, 97 S.Ct. 1104, 51 L.Ed.2d 538 (1977).

39. The analysis in *Mirmelli* hinges on the routine nature of Customs operations at Teterboro Airport. 421 F.Supp. at 687 & 688. Mount Pocono Airport does not have routine customs operations. While the *Mirmelli* analysis would find some support in Judge Clark's earlier opinion in *Brennan*, he later identified the controlling factor in these cases as being the reliability with which it is known that the flight is international. *See Ivey*, 546 F.2d at 143.

be attenuated, and the suppression of the marijuana seized would not be justified. *See Wong Sun v. United States*, 371 U.S. 471, 484-91, 83 S. Ct. 407, 9 L.Ed.2d 441 (1963).[40]

[30, 31] Since the interception took place at the functional equivalent of the border, the investigatory stop and seizure of the marijuana need only be supported by a reasonable suspicion (or reasonable basis to believe) that a violation of the customs laws was taking place. *See Beck*, 483 F.2d at 207.[41] Since a border interception is involved, there is no requirement that a warrant be obtained or that probable cause exist. *See United States v. Ramsey*, 431 U.S. 606, 97 S.Ct. 1972, 52 L.Ed.2d 617 (1977); *United States v. Glaziou*, 402 F.2d 8, 12 (2d Cir. 1968), *cert. denied*, 393 U.S. 1121, 89 S.Ct. 999, 22 L.Ed.2d 126 (1969).

[32, 33] Agent Wunder had reasonable suspicion from which he could readily conclude that violations of the customs laws were taking place and on which he could order an investigatory stop and seizure in the immediate vicinity of the plane. In the first category of information, Nassauer made Wunder aware of the significant financial backing the operation had, and provided Wunder with information thta extensive preparations were being made for the landing and that the plane was to arrive on the night of December 12. From Florida Customs Agents prior to December 12 (second category), Wunder heard that the plane trip would involve international transporting of mar-

40. Defendants argue, in essence, that but for the use of the transponder the seizure would not have been made. This is not the test; it need only be shown that the subsequent seizure had an independent basis. *See Brown v. Illinois*, 422 U.S. 590, 607, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975) (Powell, J., concurring); *United States v. Galante*, 547 F.2d 733, 740 (2d Cir. 1976); *United States v. Sand*, 541 F.2d 1370, 1376 (9th Cir. 1976).

41. At places which are not at the border or its functional equivalent, investigatory stops can also be made on reasonable suspicion, but searches and seizures must be supported by probable cause or consent. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 879-82, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975).

ijuana. On December 12 from nontransponder sources (fourth category) Wunder knew that general declarations had been filed in Florida and South Caicos and that the plane had actually landed in and taken off from South Caicos. In the fifth category Agent Wunder personally observed some of the activities connected with the Thanksgiving "trial run" and personally monitored the highly suspicious landing and unloading operations, conducted in a remote area of a small, generally noncommercial airport in the middle of the night during a severe snowstorm. No arrangements had been made for a special customs check at Mount Pocono, and Agent Wunder had no information that the DC-6 had cleared Customs elsewhere. Finally, by virtue of the monitoring of the DC-6 in flight, (the third category), Agent Wunder knew that the plane had flown 300 miles from Miami toward South Caicos and from South Carolina to Mount Pocono. With or without this third category of information, *see Wong Sun*, 371 U.S. at 484-91, 83 S.Ct. 407, Wunder had reasonable suspicion that violations of the customs laws had occurred. *See Diaz*, 503 F.2d at 1026 n.1; *Beck*, 483 F.2d at 208.[42]

42. Were the Customs interception found not to have been conducted at the functional equivalent of the border, then, while an investigatory stop could still be made on reasonable suspicion, *see Brignoni-Ponce*, 422 U.S. at 879-82, 95 S.Ct. 2574, the search and seizure would require probable cause and, since there was no warrant, exigent circumstances. Probable cause to believe violations of federal law had occurred would be supplied by all the factors listed supra (excluding any information tainted under *Wong Sun*) and other information known to Agent Wunder: Nassauer was told that the unloading would be a "little bit illegal" because of the lack of FAA-required unloading certificates; and the landing of the DC-6 at Mount Pocono Airport was unauthorized. I do not reach the question of whether probable cause coalesced in time to obtain a warrant, *see Zweibon v. Mitchell*, 170 U.S.App.D.C. 1, 516 F.2d 594, 628-30 & n. 89 (1975), or whether it coalesced when the plane actually landed and was observed unloading. *See United States v. Brennan*, 538 F.2d 711, 719-22 (5th Cir. 1976), *cert. denied*, 429 U.S. 1092, 97 S.Ct. 1104, 51 L.Ed.2d 538 (1977). *See also Chambers v. Maroney*, 399 U.S. 42, 47-51, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925); *United States v. Kelly*, 547 F.2d 82, 84 (8th Cir. 1977); *United States v. McClain*, 531 F.2d 431, 433-43 (9th Cir.), *cert. denied*, 429 U.S. 835, 97 S.Ct. 102, 50 L.Ed.2d 101 (1976).

Arrests Made at or in the Vicinity of the Landing Site

[34] The Customs Agents participating in the interception made what, under the circumstances of the unusual landing, would be the ordinary course of conduct for the Customs stop and search. *See, e.g., Ivey*, 546 F.2d at 141; *Brennan*, 538 F.2d at 714. All persons at the point of interception, either in the plane or the plane's immediate vicinity, were detained. Whether there is any practical difference between this detention and an arrest is of no concern. Just as persons disembarking at a port following an international voyage must be held during a customs inspection of their baggage, *see, e.g., Beck*, 483 F.2d at 208, so must persons found with the plane await completion of the stop and search. That search disclosed the presence of a large quantity of a controlled substance. At that point at least there was probable cause to arrest the persons who from appearances were engaged in the actual unloading operation.

The arrests of the two persons in the van on the access highway and the arrest of the person in the guard shack are cast in a somewhat different light.[43] Continuing with the analogy to *Beck* involving the dock in an international port, the situation of these three defendants, arrested near the landing site but not in its immediate vicinity, is more closely akin to persons standing some distance from a dock area, thought to be confederates of the persons whose baggage is being inspected, but who are not international travellers and are not themselves carrying customs goods. In such a case Customs Agents are entitled to make an investigatory stop, but arrests would have to be made with probable

43. These three persons were not arrested with the marijuana; there is no indicating in the record that anything incriminating was taken from them. Consequently, even if the arrests were found to be without probable cause, there is nothing to suppress.

cause. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 882, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975) (dictum) (further detention after investigatory stop must be made with probable cause). I find probable cause for the arrests, notwithstanding the fact that they were not personally engaged in the unloading operation.

The arrests of these three defendants was signaled by Agent Wunder when he told the members of the interception team to "close in." With regard to the two defendants in the van on the access highway (Powell and Nils Nelson), Nassauer had provided to Wunder, on the basis of Nassauer's contacts with persons making arrangements for the plane's landing, a description and license number for the van. This van was spotted driving along the access highway at 2:30 A.M. at about the same time the unloading was in progress nearby. It was equipped with CB radio and made several passes at the entrance to the airport. There was probable cause for the arrests of the occupants of the van. *See United States, ex rel. Wright v. Cuyler*, 563 F.2d 627, 630 (3d Cir. 1977).

Similarly, with respect to the third defendant (Cutler), Nassauer provided critical information to Wunder to the effect that the guard shack located on airport property between the landing site and the access highway had been used during the trial run over Thanksgiving. At nearly 3 A.M. in the middle of a snowstorm, it would be most unusual to find such a shack occupied. As the officer approached, the defendant began running from the shack. The fact that the shack was occupied by a person at the time the unloading was in progress nearby supplied probable cause for the arrest. *See United States ex rel. Wright v. Cuyler*, 563 F.2d at 630 (3d Cir. 1977).

Conclusion

None of the defendants established standing to contest the entry into the DC-6. Assuming standing, I find that the entry was based upon valid consent. Only defendants Tussell and Sadowsky established standing to contest the monitoring of the DC-6 in flight. Assuming standing for the other defendants as well, I hold that this monitoring did not violate any reasonable expectations of privacy. Consequently, the motions to suppress the fruits of "electronic surveillance" will be denied.

The defendants arrested in the immediate vicinity of the plane established standing to contest the interception. Since the stop and search of the plane was conducted at the functional equivalent of the border on a reasonable suspicion that violations of the customs laws had occurred, and since the arrests of the defendants (including those not in the immediate vicinity of the plane) were conducted with probable cause, the motions to suppress the fruits of arrests, searches, and seizures will be denied.[44] Trial will be set for Monday, December 5, 1977, and for the reasons set forth in the memorandum of July 19, 1977, I will order a further period of exclusion under the Speedy Trial Act from November 12 to December 4, 1977.

44. Still to be considered are defendant Mike Nelson's motion for severance and defendant Cutler's motion to suppress identification testimony.

Order of the District Court for Middle District of Pennsylvania entered April 28, 1979, dismissing Counts 2 and 3 of the indictment against Petitioner

UNITED STATES DISTRICT COURT

Middle District of Pennsylvania

Criminal No. 76-158-1

UNITED STATES OF AMERICA

v.

JACOB F. TUSSEL, JR.

ORDER FOR DISMISSAL

Pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure and by leave of court endorsed hereon the United States Attorney for the Middle District of Pennsylvania hereby dismisses Counts 2 and 3 of the Indictment (indictment) against JACOB F. TUSSEL, JR., defendant.

The reason for this request is that the defendant pled guilty to Count I of the Indictment and was sentenced.

Filed
April 28, 1978
Per Donald R. Berry, Clerk
Deputy Clerk

/s/
Assistant United States Attorney

Leave of court is granted for the filing of the foregoing dismissal.

/s/ William J. Nealon
United States District Judge

Dated: April 28, 1978

DOT Formerly LAA-113 FORM OBD-113
8-27-74

Opinion of the United States Court of Appeals for the Third Circuit in *United States v. Nelson*, No. 78-1587

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 78-1587

UNITED STATES OF AMERICA,
Appellee,

v.

MIKE NELSON,
Appellant.

Appeal From the United States District Court for the Middle District of Pennsylvania
D.C. Crim. No. 76-00158-05

Argued: January 10, 1979

Before Hunter, Garth, *Circuit Judges*, and Brotman,*
District Judge

(Opinion filed March 8, 1979)

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* Honorable Stanley S. Brotman, United States District Judge for the District of New Jersey, sitting by designation.

OPINION OF THE COURT

Per Curiam:

Appellant Mike Nelson was convicted on December 16, 1977 of aiding and abetting the importation of a controlled substance, in violation of 18 U.S.C. § 2 and 21 U.S.C. §§ 952(a) and 960. The facts of this case are fully set forth in the district court opinion denying defendant's pre-trial suppression motion. *United States v. Tussell*, 441 F. Supp. 1092 (M.D. Pa. 1977).

The principal issue of this appeal is whether six tons of marijuana seized at the Mount Pocono Airport in Pennsylvania from a private airplane should have been suppressed as evidence. Appellant contends that the evidence was illegally seized because United States Customs Service agents, acting without a warrant, installed in the plane a locational tracking device called a "transponder," which they used to monitor the plane's route. While the district court held the use of the transponder to be constitutional under the circumstances of this case, it held alternatively that the customs agent at the airport possessed sufficient information, wholly independent of the transponder, to justify the warrantless marijuana seizure. We agree with the district court that there is sufficient independent basis to justify the seizure. Accordingly, we find it unnecessary to reach the constitutional issues relative to the transponder.

For purposes of this appeal, the court will assume, without deciding, that appellant has standing to raise these fourth amendment claims,[1] It is well settled that the taint on evidence obtained as a result of an illegal search and seizure may be purged if the government can prove that it learned of the existence of the evidence from

an "independent source." *Wong Sun v. United States*, 371 U.S. 471, 487 (1962), quoting *Silverthorne Lumber Co., Inc. v. United States*, 251 U.S. 385, 392 (1919). The independent source rule applies in cases where the illegal search and seizure involves electronic wiretapping. *See Alderman v. United States*, 394 U.S. 165, 183 (1969); *Nardone v. United States*, 308 U.S. 338, 341 (1939); *United States v. Houltin*, 566 F.2d 1027, 1031 (5th Cir.), *cert. denied*, 99 S. Ct. 97 (1978). Even assuming, without deciding, that the installation and/or monitoring of the airplane violated appellant's fourth amendment rights, the marijuana to which appellant objects was seized by the use of information "sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. United States, supra* at 488.

The trial court found that the information received by Customs Agent Wunder during his month-long investigation—information unrelated to the use of the transponder—was adequate for the agent to have intercepted the plane upon its arrival at the airport. Agent Wunder specifically testified at the suppression hearing that the information received from his informant at the Mount Pocono Airport and from the Florida customs authorities "would have put me in that field" on the night of the seizure.[2] The district court's factual determination is not clearly erroneous, resting on ample support in the record.

However, even if the airport seizure was the product of independent information, as a warrantless seizure it cannot be justified unless it falls into one of the exceptions to the fourth amendment's warrant requirement. The district court upheld this seizure as a border search, ruling that sources independent of the transponder provided

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2. Transcript of suppression hearing, pp. 192-93. *See also* pp. 186-91, 195, 197-98, 207, 223, 233-34, 241.

adequate information to Agent Wunder to satisfy the criteria for this exception to the warrant requirement. The record supports the district court's determination. Agent Wunder's testimony at the suppression hearing establishes that the information provided by his informant at the airport and by the Florida authorities gave him a reasonable certainty that the flight was arriving at Mount Pocono nonstop from abroad, making the airport a "functional equivalent" of a border.[3] The same sources of non-transponder-related information gave Agent Wunder sufficient basis for belief that international drug smuggling in violation of customs laws was in progress.[4]

Appellant raises two other contentions, first that the verdict as to aiding and abetting was contrary to law and second that the trial court erred in denying his motion for severance. We find no merit in either of appellant's arguments. Accordingly, the judgment of the district court will be affirmed.

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3. *See* Almeida-Sanchez v. United States, 413 U.S. 266, 273-74 (1973). *See also* United States v. Ivey, 546 F.2d 139 (5th Cir.), *cert. denied*, 431 U.S. 943 (1977); United States v. Potter, 552 F.2d 901 (9th Cir. 1977) (both court of appeals cases applying the functional equivalent of a border doctrine with respect to non-commercial aircraft).

4. *See* United States v. Diaz, 503 F.2d 1025 (3rd Cir. 1974) (per curiam); United States v. Beck, 483 F.2d 203 (3rd Cir. 1973), *cert. denied*, 414 U.S. 1132 (1974).

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B

Order of the United States Court of Appeals for the Third Circuit entered March 23, 1979, affirming the judgment of the District Court

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 78-1548

UNITED STATES OF AMERICA

v.

JACOB F. TUSSEL,

Appellant.

(Criminal No. 76-00158-01)
M.D. of Pa. - Scranton

Submitted Under Third Circuit Rule 12(6)

March 22, 1979

Before: SEITZ, *Chief Judge*, ALDISERT and ROSENN, *Circuit Judges.*

JUDGMENT ORDER

After consideration of the contentions raised by the appellant, to-wit, that (1) in holding that the warrantless installation of a special transponder on the defendants' airplane (and the subsequent use of it to monitor the flight of the aircraft on December 12-13, 1976) was a

permissible intrusion into the aircraft under the Fourth Amendment, the district court misapplied the legal precepts of search and seizure; (2) the district court's determination that defendant Jacob Tussel does not have standing to challenge the government's installation of the special transponder is not supported by the evidence or the law; and (3) the searches and seizures and arrests of the defendants at the Mount Pocono airport on the morning of December 13, 1976, were constitutionally invalvid, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed. See *United States v. Nelson*, No. 78-1587 (3rd Cir., March 8, 1979).

By the Court,

/s/ Seitz
Chief Judge

Attest:

/s/ M. Elizabeth Ferguson
Chief Deputy Clerk

DATED: March 23, 1979

APPENDIX C

Order of the United States Court of Appeals for the Third Circuit entered April 24, 1979, denying Petition for rehearing

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 78-1548

UNITED STATES OF AMERICA

v.

JACOB F. TUSSEL,

Appellant.

(Criminal No. 76-00158-01)
M.D. of Pa. - Scranton

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, and HIGGINBOTHAM, *Circuit Judges.*

The petition for rehearing filed by

Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of

the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Seitz
Judge

Dated: April 24, 1979